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APPENDIX

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-517

ELISHA COMBS,

Petitioner,

—v.—

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petition For Certiorari Filed October 9, 1971
Certiorari Granted January 10, 1972

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-517

ELISHA COMBS,

Petitioner,

—v.—

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

RELEVANT DOCKET ENTRIES

No.	Pleading	Date Filed
1.	Indictment	March 2, 1970
2.	Motion to Suppress Evidence	Sept. 18, 1970
3.	Judgment and Commitment; Two years and $5,000.00 fine	Oct. 1, 1970
4.	Motion for a New Trial	Oct. 1, 1970
5.	Notice of Appeal, Sixth Circuit Court of Appeals	Oct. 1, 1970
6.	Opinion of Sixth Circuit Court of Appeals affirming trial court	Aug. 21, 1971
7.	Petition for Rehearing	Aug. 25, 1971
8.	Order denying Petition for Rehearing	Sept. 15, 1971
9.	Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit	Oct. 9, 1971
10.	Petition for Writ of Certiorari granted	Jan. 10, 1972

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
MARCH SESSION 1970
COVINGTON

NO. 10746

UNITED STATES OF AMERICA
vs.
ELISHA COMBS, PEARL COMBS, and
RAYMOND COMBS

COUNT 1.

(TITLE 18, SEC. 659, USC)

THE GRAND JURY CHARGES:

That on or about the 1st day of August, 1969, in the Eastern District of Kentucky,

ELISHA COMBS and
PEARL COMBS

unlawfully, wilfully and knowingly did receive, possess and conceal chattels of a value in excess of $100.00, that is twenty-six (26) cases of Seagram's Seven Crown Whiskey, each containing a label with the number 693 thereon and indicating the consignee of said whiskey to be the Michigan Liquor Control Board, with the following individual identifying markings:

Production Date	Serial Number
7/23/69	K640339
"	K640344
"	K640346
"	K640348
"	K640352
"	K640364
"	K640367
"	K640387
"	K640680
"	K640681
"	K640682
"	K640683
"	K640684
"	K640685
"	K640686
"	K640691
"	K640697
"	K640706
"	K640711
"	K640712
"	K640713
"	K640796
"	K640798
"	K640816
"	K640819
"	K640820

which was part of a shipment which had been embezzled, stolen and unlawfully taken and carried away from the All Ohio Express Terminal, 3411 Spring Grove Avenue, Cincinnati, Ohio, on or about July 28, 1969, while moving in interstate commerce, from Lawrenceburg in the State

of Indiana, to Toledo, in the State of Ohio, the said Elisha Combs and Pearl Combs then knowing that said chattels had been stolen.

COUNT 2.

(TITLE 18, SEC. 1510, USC)

That on or about the 4th day of October, 1969, at Newport, Campbell County, in the Eastern District of Kentucky,

ELISHA COMBS and
RAYMOND COMBS

unlawfully and wilfully did injure the person of James Lee Martin on account of his having given to a Special Agent of the Federal Bureau of Investigation, information relating to a violation of a criminal statute of the United States, in violation of Title 18, Section 1510, United States Code.

COUNT 3.

(TITLE 18, SEC. 1510, USC)

That on or about the 30th day of September, 1969, at Newport, Campbell County, in the Eastern District of Kentucky,

ELISH COMBS

unlawfully and wilfully did endeavor by means of intimidation and threats thereof, to obstruct and prevent the communication of information relating to a violation of a criminal statute of the United States, from one Janet Sue Martin Ballard to a Special Agent or Agents of the Fed-

eral Bureau of Investigation, in violation of Title 18, Section 1510, United States Code.

A TRUE BILL
/s/ DAVID C. LOUCK, JR.
FOREMAN

.....
EUGENE E. SILER, JR.
UNITED STATES ATTORNEY

SEARCH WARRANT

[COVER PAGE OMITTED]

THE COMMONWEALTH OF KENTUCKY
MAGISTRATE COURT

The affiant, London Owens whose post office is Hazard, Kentucky, state of Kentucky, states that he is a citizen and that he has reasonable grounds to believe, and does believe that Pearl Combs has in his possession approx. 98 cases of Seagrams 7 Crown Pints whiskey, in a house, building or premises, owned, operated or controlled by Pearl Combs and located and described as follows: Five (5) Room Wood Frame House located 1.5 Miles in Gorman Hollow and is located on the left side of the Road travelling West of of Kentucky 451., and all other buildings such as barns, garages, storage buildings that May be located on the premises of the said Pearl Combs.

That he bases the foregoing affidavit and his belief and grounds for the same upon the following facts and for the following reasons:
Has reasonable grounds from information from an informant that this whiskey was transported to the above described premises.

Affiant /s/ LONDON OWEN

Subscribed and sworn to before me by London Owens this 20th day of Sept. 1969.

/s/ JESSE P. ENGLE, Judge

SEARCH WARRANT
THE COMMONWEALTH OF KENTUCKY
Magistrate Court

To the Sheriff or any Constable or Police Officer of the State of Kentucky.

You are commanded to search the following premises, to-wit:

One only Five (5) Room Wood Frame House Located 1.5 miles in Gorman Hollow and is located on the left side of the road travelling west off of Kentucky 451., and all other buildings such as barns, garages, storages buildings that may be located on the premises of the said Pearl Combs.

said to be in the possession of Pearl Combs for the detection of Approx. 98 case of Seagrams 7 Crown Pints Whiskey and you will seize any such above described articles and you will arrest the person or persons in charge or possession of such premises and bring such person or persons before me or some other judge or justice of the peace to be dealt with according to law, and you will then and there make due return of this writ.

Given under my hand as Judge of Magistrate Court on the 20th day of September, 1969.

./s/ JESSE P. ENGLE, Judge

Executed by searching the described premises and finding 26 cases of pints Seagrams 7 Crown Whiskey.

9/20/69 /s/ L. T. OWENS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
MARCH SESSION 1970
COVINGTON

[TITLE OMITTED]

MOTION TO SUPPRESS EVIDENCE

(Filed September 18, 1970)

Now comes the defendants, Elisha Combs, Pearl Combs and Raymond Combs, and move the Court to suppress the evidence herein for the reason that the same was obtained in violation of his constitutional rights and guarantees.

.....
Attorney for Defendants

Fourth Amendment, Constitution of the United States
Mapp v. Ohio, U. S. Supreme Court, 367 U. S. 343
U. S. v. Spinelli, 393 U. S. 410
U. S. v. Aguilar, 378 U. S. 108
U. S. v. Lassoff, 147 Fed. Sup. 944
U. S. v. Elkins, 364 U. S. 206

[CERTIFICATE OF SERVICE OMITTED]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

(At Covington, September 25 and 28, 1970)

[TITLE OMITTED]

EXCERPTS FROM TRANSCRIPT OF TESTIMONY OF WITNESSES REQUESTED BY GOVERNMENT

Before:
His Honor, Mac Swinford, Judge of Said Court

* * *

[34] **Jimmy Martin**

being called as a witness in behalf of the Government, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Eugene E. Siler, Jr.
United States Attorney

Q State your name.
A Jimmy Martin.
Q And where do you live, Jim?
A 407 West Ninth, Newport, Kentucky.
[35] Q Now, how long have you lived there?
A Oh, about eleven months.
Q Now, do you know the defendant Elisha Combs?
A Yes.
Q Do you know the defendant Raymond Combs?
A Yes.
Q Do you know the defendant Pearl Combs?

A Yes.

Q How long have you known the Combs family?

A I have know Ray a long time.

Q A long time?

A Yes.

Q How long?

A Oh, roughly guessing, I would say about seven or eight years.

Q That is the same as Raymond Combs, the defendant?

A Raymond, yes.

Q How long have you known Elisha?

A I had met him a long time ago. I didn't know him too well until about seventeen, eighteen months ago.

[36] Q All right. Now, James, with regard to the matter which is on trial here today, will you direct your attention to around about the latter part of July of 1969 and tell whether you ever had occasion to go to your sister's house, Janet Ballard?

A Yes.

Q Did you ever go there?

A Yes.

Q And what did you see at the house?

A She told me she had something in the basement she wanted to show me, so I went down and looked and I seen the whiskey down there.

Q All right. And do you recall what day of the week it was or anything?

A No.

Q Do you recall what kind of whiskey this was you saw at her house?

A Yes.

Q What kind was it?

A It was pints of whiskey, Seagram's Seven Crown.

Q All right, was it in open or sealed up boxes?

A Sealed up in boxes.

MR. SILER: I will ask that Exhibit No. 4 be passed to him.

[37] (Reporter's note: Government's Exhibit No. 4 was given to the witness.)

Q Would you look at that emblem and see if you can recognize that as being on any of the boxes that you saw?

A Yes, sir.

Q And did you see it on some of the boxes?

A Yes, sir.

Q And was it white in color or some other color?

A It was on an orange — it was printed on an orange block.

Q All right. Now, when did you first know about this whiskey?

A The last part of July.

Q Did you know about it before you saw it there in her house?

A No.

Q Now, after you saw it, did you talk to her, did you tell her anything about it?

A Yes, I told her I had seen on television and I heard it on the radio about it being stolen.

Q All right. Did you advise her to do anything?

A Yes, I advised her to call him [38] and tell him to get it out of the basement.

Q Now, what time of day was this, do you recall?

A That was late in the evening.

Q Did you have any conversation with Elisha concerning this whiskey in her house?

A Yes. He called me at home.

Q He called you at your house?

A Yes.

Q And what did he say to you?

A He said he had a lot of whiskey, that he would make a lot of money on.

Q And what did he say with regard to what you were going to do with it? Did he say anything about taking it anywhere?

A I would like to hear that again. I didn't understand.

Q Well, what did you and Elisha do with this whiskey?

A We went up to my sister's and got it.

Q All right.

A And we took it to his wife's house on Columbia Street, in Newport.

Q Now, when you saw it at Janet's house, was that in Newport, too, or in Bellevue?

[39] A No, that was in Bellevue.

Q Was that in Campbell County?

A Yes.

Q And how many cases did you see there at Janet's house?

A Forty.

Q Now, how did you transport these cases from Janet's house to Elisha's wife's house?

A In cars.

Q In cars?

A Yes.

Q Did you use your car?

A Yes.

Q Who else's car was used?

A Elisha Combs'.

Q All right. And when you got to his wife's house, where did you put the whiskey?

A In her basement.

Q All right. Did you take some or all of it out of Janet's house?

A Took it all.

Q And was that all that was at his wife's house or was there some more there when you —

A There was more whiskey at her house.

Q Do you know how much more?

A No, roughly guessing, I would say [40] 70 or 80 cases.

Q 70 or 80 cases. Did that include what you brought?

A Yes.

(Reporter's note: An off the record discussion was held between defense counsel and counsel for the Government.)

Q Now, after you had talked to Janet that day, did you call Elisha or did he call you?

A He called me.

Q And after this was taken to the wife's house, what — did Elisha say anything more about it or what did you do that morning?

A Nothing at that point. We just went home then.

Q Now, later on that week, did you have occasion to discuss with Elisha anything about this whiskey?

A The only thing about selling it is all.

Q All right. What did he tell you about whether he was going to take it any place or do anything with it?

A Yes, he said he got a phone call that the heat was on and he had to move it.

Q Got a phone call the heat was on?

A Yes.

[41] Q Then what did you do after that?

A We went up and loaded up the whiskey.

Q And where did you load the whiskey this time?

A On Columbia Street.

Q His wife's house?

A Yes.

Q And what did you load the whiskey in?

A G.M.C. pick-up truck.

Q All right. What color was it?

A Red.

Q Whose truck was it?

A Elisha Combs'.

Q Was any one else with the two of you at that time?

A No.

Q Just the two of you?

A Just the two of us.

Q And how was it placed in the truck, that is, was that all you put in there or did you put anything else in there?

A We just stacked whiskey in the truck was all.

Q Was it covered over with anything?

[42] A A couple of old tarpaulins.

Q All right. Was anything else placed on top of the tarpaulin.

A Rocks.

Q And then do you recall what day of the week this was?

A That was on a Thursday night, late in the morning, or Friday morning real early is what it was.

Q After midnight?

A Yes.

Q And where did you take this truck load of whiskey?

A To Hazard, Kentucky.

Q And whereabouts in Hazard?

A To Elisha Combs' father's farm.

Q Now, when it was brought to Elisha Combs' father's farm — what is Elisha's father's name, incidentally?

A Pearl Combs.

Q Had you ever met Pearl Combs before you went down there?

A Just a couple of times.

Q Where was this whiskey put?

A In an old shed about fifty feet away from the house.

Q All right. Did any one indicate [43] whose shed it was?

A No.

Q Was it close to the premises then?

A Yes.

Q Did you rent the shed from Mr. Combs or anybody?

A No.

Q It didn't belong to you then?

A No.

Q How many of the cases that you took to the truck were placed there in the shed at Pearl Combs' house?

A All of them.

Q What, if anything, was said about the cases?

A We just loaded them in the shed and went in for breakfast is all.

Q Was Pearl there at the time?

A Yes.

Q Did he see you all unloading the truck?

A Yes.

MR. HOPKINS: Well, of course, I will have to object, I guess, to this. This may be a conclusion on his part.

THE COURT: What he saw?

[44] MR. HOPKINS: Well, all right, I will go into the circumstances on cross-examination.

THE COURT: He said he saw them unloading from the truck. He can say what he saw.

Q After this was unloaded and you ate your breakfast, what did you do?

A Laid down on the bed for a couple of hours, about two and a half hours.

Q Then where did you go?

A We loaded a couple — or Ace got a couple — Elisha Combs got a couple of tires out of the back room and put them in the truck and then we went down and stopped at a garden and then we went on in town and stopped at an oil station and then I started driving and drove all the way home.

Q Were you paid anything for this?

A No.

Q Did you ever go back to this location at Hazard, Kentucky?

A Yes.

Q And did you go back there with regard to the whiskey?

A Yes.

Q And what did you do there?

A I went down with the Federal, F.B.I.

Q All right. Is this Mr. Glossup, [15] was he with you?

A Yes.

Q And when did you tell the F.B.I. about this?

A I couldn't tell you exactly the date.

Q Well, was it after you took the stuff down to Pearl's house?

A Yes.

A And when you were with the F.B.I. at this place in Hazard, Pearl Combs' house, was this when a search warrant was executed?

A We went up there, then we went back to the police barracks and that is where they left me and they went back.

Q For what purpose did you go there the first time — I mean this time that you returned with Mr. Glossup?

A To show them where the whiskey was at.

Q And when you first talked to Mr. Glossup, did you tell him what you knew about this matter?

A Yes.

Q And then after this, did you have some condition about the way you provided the information at that time? That is, did you want them to reveal your name [46] or keep your name confidential or what?

A Wanted them to keep it confidential.

Q When did you ever change your mind about that, if you ever did? What caused you to change your mind? Did you ever change your mind?

A Yes.

Q And what caused you to do that?

A A fight.

Q All right. Now, you mentioned a fight. Would you state what happened on October the 4th, 1969, concerning this matter and Elisha Combs?

A You mean the fight?

Q Yes, sir.

A Well, we —

MR. HOPKINS: (interposing) Would you talk just a little bit louder, please?

THE COURT: Talk louder, Jim, so the jurors on the back row and Mr. Hopkins and everybody can hear you. You can speak out louder.

A Me and my wife sit and watched television that night and then she went upstairs and then I went over to my sister's at 2 o'clock and I knocked on the door and I talked to my sister.

Q What sister are you talking about?

A About Helen Jordan. And I went back across the walk to my house and stayed there until a [47] quarter of three and at a quarter of three I decided to take a ride up around the court house, which I went up around the court

house and went over and crossed over to Saratoga and went up Ninth and come over to Ninth and Monmouth and I ran into Elisha Combs and them coming the opposite way.

Q O.K. Then what did you do?

A I turned down Monmouth Street and they followed me. They followed me all the way down to my house and I got out of my car and when I got out of my car, started to walk back and Elisha Combs got out on the passenger side and Ace or Raymond Combs got out on the driver's side and Elisha Combs come around. He asked me a question and then took a swing at me.

Q All right. And then who was with Elisha at this time?

A Raymond Combs.

Q All right. And is that the defendant Raymond Combs?

A Yes.

Q And was any one else with them?

A No.

Q Now, after Elisha took the swing at you what did you do?

A I throwed up my arm and swung back at him.

Q And then what happened?

[48] A Raymond grabbed me around the neck from the back and hit me in the back.

Q All right. Now, did they say anything to you during all this time?

A They said that's for squealing on them and the TV.

Q That is for what?

A Squealing on them and a TV.

Q I didn't understand. Squealing?

A Telling on them.

Q And then how many time were you hit, would you say?

A Quite a few times, because my head looked like a football.

Q All right. Did they just use their hands or what? Did they have any weapons that you ever saw?

A Well, when Ace or Elisha Combs come around the car it looked like he had a knife and that is why I was watching him and when he swung at me that is when I thought he swung at me with a knife.

Q Now, did you have any weapons yourself?

A No.

Q Was any one else with you?

A No.

[49] Q And after they hit you, were you standing up all the time or in what position were you?

A When he grabbed me he bent me over backwards like and hit me in the back and then Elisha Combs grabbed my hands and forced me over the side of my car and bent me over my car and started beating me in the back.

Q All right. Would you come down here and demonstrate on this table what position you were in. Use that table as the car hood. Show what position you were in at the time.

(Reporter's note: The witness left the witness stand and walked to a table in front of the jury box.)

A Well, it was the trunk of the car, the trunk of the car was longways, they bent me over the car like this (indicating) and bent my head sideways, like this (indicating) and held me.

MR. SILER: All right. You may return.

(Reporter's note: The witness returned to the witness stand.)

Q Now, did you receive any cuts or bruises as a consequence of this?

A Yes.

Q And where were they?

A Cut right here (indicating left side of face).

Q All right, will you turn around to the jury and show — is there still a place there?

[50] A Yes, a scar (indicating on face).

Q Was this a bruise or bloody or what?

A That was laid wide open.

Q All right. And where did you go after this happened?

A To the hospital.

Q All right. How did you get loose there?

A I jerked myself loose and took off running.

Q Where did you run to?

A To my house.

Q And after you got in the house, how soon after that did you go to the hospital?

A Between — I would say about ten minutes.

Q All right. And how long did you stay at the hospital?

A I would say about an hour and a half or two hours.

Q Now, did you see any policemen at the hospital on that occasion?

A Not at the hospital, at my house.

Q And what were their names, do you know?

A No.

[51] Q You just saw some?

A Yes.

Q Did you talk to Janet after this happened?

A Yes. She came down to the house, out to the hospital.

Q Now, when you first went to the F.B.I., did you just go straight to the F.B.I. or did you talk to some one else before?

A I talked to some one else before.

Q Now, who was that?

A Grover Johnson.

A Night Chief of Police in Newport.

Q Did you know him before this occasion?

A Yes.

Q Did you act on his advice when you went to the F.B.I.?

A Yes.

Q Now, James, did you have occasion to see Elisha or Raymond, either one, this week?

A Yes.

Q Where was that?

A I was driving across Eighth Street and Ray come out of Elisha's yard and flagged me down.

Q And what conversation did he [52] relate to you at that time?

A He asked me —

MR. HOPKINS: (interposing) Who are we talking about?

MR. SILER: Ray.

Q Is that Raymond, the defendant here?

A Yes.

Q What did he say to you at that time?

A He asked me to take it easy on him in court.

Q What else was said? What did you say to him?

A I told him if he would tell the truth I would try and help him.

Q What did he say, if anything?

A He said he couldn't change his story because he would be perjuring himself.

Q And did he say anything else about doing anything for you?

A He said if I would take care of him now that he would help me out later.

Q And did you ever have occasion to — did you ever have occasion to be at the 500 Club and be there with Elisha Combs and have a scrape with him?

A I have been there with him but I didn't have a scrape with him.

[53] Q Were you on this evening at the 500 Club?

A No.

Q That is the night you got hurt?

A No.

Q Did you ever receive any money from the sale of this whiskey that you saw?

A None.

MR. SILER: You may ask.

• • •

[169] **Elisha Combs**

being called as a witness in his own behalf, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. William F. Hopkins
Counsel for the Defendants

MR. HOPKINS: Please speak out loudly.

Q What is your name?

A Elisha Combs.

Q Where do you live?

A 802 Monroe, in Newport, Kentucky.

Q Do you own that building there?

A My brother does.

Q How long have you lived there?

[170] A About a year and a half, two years.

Q And you work?

A Yes, I do.
Q For whom?
A Fisher Body, in Norwood, Ohio.
Q And what do you do there?
A I'm assembly line worker.
Q A what?
A Assembly line worker.
Q What does that mean?
A We build Chevrolets, you know, I install parts on them.
Q How old are you now? How old are you?
A Thirty-seven.
Q How long have you been working there at Chevrolet?
A Eighteen years.
Q Started there when you were nineteen?
A Uh-huh.
Q And you are working there now?
A Yes, sir.
Q Are you married?
A Yes, sir.
Q Are you and your wife living together?
[171] A No.
Q How long have you been separated?
A Since 1960.
Q For ten or eleven years?
A Yes, sir.
Q What is the relationship between you and your separated wife?
A It's pretty bad. We don't even talk.
Q You don't speak?
A No, we don't.
Q This Janet Ballard, do you know her?
A Yes, I do.
Q How long have you known her?

A I'd say for ten or twelve years or longer.

Q I'm speaking about the sister of Jim Martin.

A Yes, sir.

Q To expedite this matter, you heard her testimony here that you called her on a certain day and said that you had some whiskey. Do you recall that testimony?

A Yes, sir.

Q Did you call her that day?

[172] A No, sir.

Q Did you have any whiskey?

A No, sir.

Q What do you know about this whiskey? Did you ever see it shortly thereafter?

A Yes, sir.

Q Where? Tell the jury when and where you saw it?

A In Janet Martin's living room.

Q How did you happen to be over there?

A She called me and asked be to bring a weed sickle to cut some weeds with.

Q You mean a sickle to cut weeds?

A Uh-huh.

Q And did you take it over to her?

A Yes, I did.

Q And when you entered the apartment, is that when you saw these cases of liquor?

A Yes, it was.

Q Was there any conversation between you and she in reference to that liquor?

A Yes, sir.

Q What was it?

A I asked her about the whiskey, you know, who it belonged to and she said it belonged to Jim [173] Martin and Charles Chapman.

Q Charles Chapman?

A Yes.

Q Was there any conversation in reference to who was buying the liquor?

A Yes, sir. They said they was going to sell it to Jim Russelburg, which owns two carry-outs, one in Dayton, Kentucky, and owns one at Seventh and Columbia or Sixth and Columbia, in Newport, Kentucky.

Q Jim Russell?

A Jim Russelburg.

Q Do you know who owns the house or home where Janet lives?

A Yes, I do.

Q Who?

A Jim Russelburg.

Q Well, do you know from conversation with Janet whether or not she is paying any rent or it is rent-free or what?

A No, I don't.

Q Was there any other conversation about the whiskey or liquor?

A No, sir.

Q Did you at any time touch any liquor or cases of liquor that were there?

A No, sir.

[174] Q I want to next go to the early morning of October the 4th or shortly before that, say three or four or five days before that. I will ask you whether or not Janet Ballard came to your house?

A Yes.

Q For what reason or purpose?

A Well, she came to my house and said that Jim was getting in trouble, that the heat was getting on him over that whiskey, said it had been stolen and she said that he had went to Grover Johnson.

Q Now, wait a minute. He is the Night Chief?

A That's right.

Q At Newport?

A And said that they was trying to put the blame off on me, over the whiskey.

Q Now, that is what Janet told you?

A Yeah.

Q What did you do about that?

A Well, I went to the Newport Police Station and asked them if I could have the phone number of the F.B.I. in Covington, Kentucky.

Q For what purpose?

A Well, I was going to explain it to them, you know, and tell them what she had told me and report it about the whiskey being there.

[175] Q Did they give you a telephone number?

A Mr. Simmons, of the Newport Police Station, gave me a telephone number and I tried at different times and I could never get no answer. It was the wrong number or something, every time I would try to reach the F.B.I.

Q Mr. Glossup came to you, this gentleman seated here (indicating). Did he give you that number.

A Yes, sir.

Q Was that the original trip you made?

A Yes, sir.

Q Given to you by the Newport Police?

A Yes, sir.

Q Now, I want to direct your attention to the early morning of October the 4th. Where were you at or about 2:00 or 2:30 in the morning?

A I was at the 500 Club at Ninth and Brighton in Newport.

Q The 500 Bar?

A Yes.

Q How long had you been in the bar?

A About thirty minutes.

[176] Q You heard your brother testify he was with you, is that correct?

A Yes, sir.

Q How much had you had to drink?

A We had about two beers.

Q Were you sober?

A Yes, sir.

Q When they closed at 25 after 2 or 2:30, did you and your brother, Raymond, leave there?

A Yes, we did.

Q Well, what happened when you went outside?

A Well, we went out, you know there was several other people, but Raymond and I was together and Jim Martin was across the street in his car and I told Ray that over there was Jim, you know, which he had met us there before. That wasn't the first time he came down. He came down before and when we went over I asked Jim how did he come out in court today.

Q What were you talking about?

A Well, they had arrested him for some stolen merchandise, you know, and he was supposed to have been in court that day.

Q Jim?

A Yes, sir.

Q Nothing to do with this case?

A No. And I asked him how he [177] come out in court today and he said, "They put me on open docket," and then he said, "What's this I hear you've been writing to the F.B.I., squealing to the F.B.I.?" And then he hauled off and hit me in the mouth and busted my mouth and nose.

Q Did he hit you hard?

A Pretty hard, hard enough to bring the blood.

Q What did you do?

A Well, I busted him back and he drew a gun and hit me across the hand.

Q Where was your hand when you got hit?

A Well, when he swung at me with that gun, I threw my hands up to keep from hitting me across the face and he hit my hand.

Q Where was your brother?

A He ran in and separated us and said, "What in the world's wrong? You boys are going to get in trouble — you guys are going to get in trouble."

Q Was anything said by you or your brother at that time or any time with reference to intimidating Jim Martin or stopping him from testifying in this Federal case?

A No, sir, none whatsoever, nothing whatsoever.

[178] Q You weren't even arrested on the Federal case at that time, were you?

A No, sir.

Q Well, to save time, did you leave there, did you go home and get your face washed and fix up a little bit?

A Yeah, I went home.

Q Did you go to police headquarters?

A Yes, I did.

Q And they told you, as your brother said, to come back at 9 o'clock and get a warrant?

A Yes, sir.

Q Then tell about seeing, if you did, something happened before the Pink Pussy Cat.

A As we went up, the detective's car was sitting there and they was a-coming out, you know, and they was just coming out the door and I said, "There is Mr. Faulkner and Grover Johnson," so I told him to park, you know, and I would talk to Don Faulkner, you know, and tell him that Jim had a gun, you know, and ask for a little protection.

Q Now, so far as sobriety, what was —

A Do what?

Q What is the Night Chief's name?

A Grover Johnson.

Q In what state of sobriety was he?

A They came over to our automobile [179] which was parked across the street and he was "blind drunk" and I was talking to Don Faulkner because I didn't want to talk to him in the first place and he did all the talking. I told him what happened and he said, "If you boys don't want to get in trouble, you better get out of here," and he was "blind drunk", his eyes was real glassy.

Q Then you left?

A We did.

Q And you went to the hospital?

A We did.

Q I don't want to lead you, but to hurry this thing up, did they treat you?

A Yes, sir.

Q Did you go back later to have a cast put on your hand?

A At 10 o'clock the next day.

Q How long was the cast on your hand?

A Oh, about six weeks.

Q Jim Martin has testified here that you and he in your truck went to — took this whiskey from Janet Ballard's apartment house up to your father's place and put it in a shed. Is that true or false?

A That's false.

Q In reference to Janet Ballard, during the past say three months, how many times has she come over to your house?

[180] A I would say approximately twenty times.

Q For what purpose?

A Well, every time Mr. Glossup would talk to her, the

Prosecuting Attorney or Grover Johnson, whoever it might be, she would come and tell me just exact words they would say, now, and I told her she was going to get in trouble, you know, running up there and carrying messages like that, because you are not supposed to do things like that.

Q She was telling you everything that happened?

A Word by word.

Q Whoever talked to her?

A Word for word.

Q Is that correct?

A That's right.

Q Have you been intimate with her? Have you gone to bed with her?

A Yes, I have.

Q On many occasions?

A Yes, sir.

Q I want to call your attention to possibly two or three or four months — I don't know, you know better than I — when you were in the 500 Bar and she was there and a fellow named, I think, Don Harmon. Do you know a Don Harmon?

[181] A Yes, I do.

Q Do you recall that incident?

A Yes, I do.

Q Will you tell the jury about that, what it was about?

A Well, I was in the 500 Club, a-talking to Don Harmon and the guy at the bar told me some blonde was in —

MR. SILER: (interposing) Object to what the man at the bar said.

MR. HOPKINS: Don't repeat the conversation. Pardon me, I'm sorry.

A (continuing) I was in the 500 Club and Janet Ballard came in and she came over and asked us to take a table with her and have a couple of drinks.

Q Did you?

A Yes, we did.

Q All right. Now, I want you to tell this jury what Janet Ballard said to you in reference to her testimony here.

A She apologized to me more than once and she cried about it and said she did it to save her brother's neck and said she had made a statement to Mr. Glossup and she said that she was afraid she had got herself in trouble about it, you know, and I told her, I said, "Janet, all you have got to do is tell the truth." I said, "That is [182] all you have to do when you get in the seat." I said, "Them statements don't mean nuthin', what you told them." I said, "Just tell the truth, that's all you have to do."

Q Did she talk anything to you on those twenty trips to your home about shock treatments?

A Yes, she said she had been sick and had had shock treatments, several of them, I don't know just how many she said she had had.

MR. HOPKINS: You may cross-examine.

• • •

NOTATION WITH REFERENCE TO OPINIONS AND ORDERS OF SIXTH CIRCUIT COURT OF APPEALS

The complete text of the Opinion filed on August 12th, 1971, by the United States Court of Appeals for the Sixth Circuit may be found on Page 6 of the printed "Petition for a Writ of Certiorari" to the United States Court of Appeals for the Sixth Circuit filed with the Supreme Court of the United States on October 10th, 1971.

A complete text of the "Order Denying a Rehearing" by the United States Court of Appeals for the Sixth Circuit may be found on Page 9 of the "Petition for a Writ of Certiorari" to the United States Court of Appeals for the Sixth Circuit filed with the Supreme Court of the United States on October 10th, 1971.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

E. ROBERT SEAVER
Clerk of the Court

January 10, 1972

William F. Hopkins, Esq.
414 Walnut Street
Cincinnati, Ohio 45202

RE: Elisha Combs v. United States
No. 71-517

Dear Mr. Hopkins:

The Court today took the following action in the above case:

"The petition for a writ of certiorari is granted."

Enclosed is a memorandum describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable.

Very truly yours,

E. ROBERT SEAVER, Clerk
By /s/ HELEN K. LOUGHRAN
(Mrs.) Helen K. Loughran
Assistant Clerk

AIR MAIL
Enclosures

Supreme Court of the United States

No. 71-517 ---, ~~October Term,~~ 19

Elisha Combs,

Petitioner,

v.

United States

ORDER ALLOWING CERTIORARI. Filed January 10 -------- , 19 72.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth ---------- Circuit is granted.

FILE COPY

Supreme Court, U.S.
FILED
OCT 9 1971
E. ROBERT SEAVER, CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-517

ELISHA COMBS,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILLIAM F. HOPKINS
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. ————

ELISHA COMBS,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OFFICIAL REPORTS

The Sixth Circuit Court of Appeals case of United States v. Combs is not yet officially reported. The unofficial report is attached as Appendix "A" to this Petition. Also attached to this Petition as Appendix "B" is the Court's order overruling Petitioner Combs' request for a rehearing.

GROUND FOR JURISDICTION

The Sixth Circuit Court of Appeals decision was rendered on August 12, 1971. The "Petition for Rehearing" was denied by the Sixth Circuit Court of Appeals in its order entered on September 15, 1971. The statutory authority for this appeal is 28 U.S.C. § 1254 (1).

QUESTION PRESENTED FOR REVIEW

Did the Sixth Circuit Court of Appeals follow *Jones* v. *United States,* 362 U.S. 257 (1960), when it denied standing to challenge a search to the Petitioner when the Petitioner was charged with receiving, possessing, and concealing contraband in a Federal indictment?

STATEMENT OF THE CASE

Petitioner Combs was indicted by a Federal Grand Jury on a charge that he unlawfully, willfully, and knowingly did receive, possess and conceal certain liquor which had been stolen from Interstate commerce in violation of Title 18, U.S.C., § 659.

The Petitioner entered a plea of not guilty and filed a pre-trial Motion to Suppress the contraband liquor alleging that the Affidavit used to obtain a search warrant was defective.

Without the issue of standing having been raised in the trial court, the court overruled the Motion to Suppress.

The Petitioner was found guilty by a jury and the Court sentenced the Petitioner to two (2) years imprisonment and imposed a fine of Five Thousand ($5,000.00) Dollars.

The Petitioner appealed the decision of the District Court for the Eastern District of Kentucky to the Sixth Circuit Court of Appeals and on August 12, 1971, the Sixth Circuit Court of Appeals affirmed the judgment of conviction.

A Petition for Rehearing was filed on August 25, 1971, and the rehearing was denied by an order of the Sixth Circuit Court of Appeals entered on September 15, 1971.

ARGUMENT

QUESTION PRESENTED NO. 1

DID THE SIXTH CIRCUIT COURT OF APPEALS FOLLOW JONES v. UNITED STATES, 362 U.S. 257 (1960) WHEN IT DENIED STANDING TO CHALLENGE A SEARCH TO THE PETITIONER WHEN THE PETITIONER WAS CHARGED WITH RECEIVING, POSSESSING, AND CONCEALING CONTRABAND IN A FEDERAL INDICTMENT?

The Sixth Circuit Court of Appeals held that before an evaluation of a search may be made the party challenging the search must demonstrate that he has standing to raise the issue.

However, when the accused is charged with a crime which includes "possession" as one of its elements, the accused finds himself in the dilemma posture discussed in *Jones* v. *United States,* 362 U.S. 257:

> "The same element in this prosecution which has caused a dilemma, that is, that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized which ordinarily is required when standing is challenged."

If the accused admits possession in order to acquire standing, the admission may be used against him at his trial on the merits.

The *Jones* case, perceiving this dilemma, correctly held that when one is charged with a crime, having as one of its elements "possession", standing is automatically conferred, "under any fair and rational conception of the requirements of Rule 41 (e)."

The Sixth Circuit Court of Appeals in its decision of August 12, 1971, annexed as Appendix "A", has failed to give to the Petitioner the benefit of the exception which the *Jones* case announced.

In the Sixth Circuit Court of Appeals' order denying a rehearing, the Court cited *Wong Sun* v. *United States*, 371 U.S. 471 (1963), and *United States* v. *Lopez*, 420 Fed. (2nd) 313 (2 CA 1969). The Sixth Circuit cited *Wong Sun* and *Lopez* as limiting *Jones* to the victim of a search.

The basis for the Court limiting *Jones* cannot be found in either *Wong Sun* or *Lopez*.

Both *Wong Sun* and *Lopez* held that an accused may not vicariously rely on the Fourth Amendment rights of a third party.

Wong Sun attempted to rely on the rights of Blackie Toy and Johnny Yee who were arrested without probable cause.

Lopez attempted to rely on Cooper's successful motion to suppress evidence obtained without a search warrant.

Alternatively, *Lopez* attempted to rely upon a "possessory interest" in the articles seized, but he was not charged with a crime having as one of its elements "possession", but was charged with a crime having to do with defrauding the Internal Revenue Service.

Since Petitioner Combs desired to assert his own rights under the Fourth Amendment and not the rights of others, but, could not acquire standing to assert those rights without first surrendering his Fifth Amendment right against self-incrimination, the Sixth Circuit Court of Appeals erred in its ruling that Petitioner did not have standing.

The Petitioner respectfully requests the Supreme Court to issue a Writ of Certiorari so that the line of cases denying standing to those who would vicariously claim Fourth Amendment rights could be distinguished from the line of

cases where the accused may not develop his standing by claiming ownership or possesison without incriminating himself on the isssue of guilt.

The Petitioner would urge the Court to adopt a rule: **that when an indictment charges the accused with receiving, possessing, or concealing contraband, the accused has standing to challenge the search and seizure of the said contraband.**

The Fifth Amendment rights protecting against self-incrimination may then be properly balanced with the Fourth Amendment rights against unreasonable searches and seizures.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

WILLIAM F. HOPKINS
Attorney at Law
414 Walnut Street
Cincinnati, Ohio 45202
Attorney for Petitioner

APPENDIX A

No. 20947

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ELISHA COMBS, *Defendant-Appellant.*	APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed August 12, 1971.

Before: PHILLIPS, Chief Judge, and EDWARDS and BROOKS, Circuit Judges.

PER CURIAM. The single issue argued on this appeal by the defendant-appellant is the validity of a search warrant. The government contends that such issue need not be decided as the defendant lacks standing to challenge the legality of the search and seizure. We agree and affirm the judgment of conviction.

Defendant was indicted and convicted by a jury of receiving and concealing twenty-six cases of taxpaid whiskey stolen from an interstate shipment in violation of Title 18 U.S.C. § 659. The allegedly defective search warrant

was executed upon the premises of the father of the defendant, which were located at Hazard, Kentucky. The defendant lived in Newport, Kentucky, and was not present when the warrant was executed and the whiskey discovered inside a shed a short distance from his father's residence. At the time of the search, the mother of the defendant produced a rent receipt showing that the shed was under lease to a Jim Martin and Charlie Chapman. The defendant disclaimed any interest in or knowledge of the whiskey in the shed, and there was testimony at the trial that it had been placed there by one of the named lessees.

A motion to suppress the evidence seized as a result of the search of the shed was made by the defendant and his two codefendants[1] prior to trial and, following an evidentiary hearing, was denied by the District Judge. The denial was apparently grounded on the conclusion that the allegedly defective affidavit for the search warrant did provide a sufficient basis for a finding of probable cause. There was no evidence introduced at the hearing relating to the standing of the defendant to challenge the validity of the search.

As the evidence at the trial showed, the defendant, a resident of Newport, Kentucky, asserted no possessory or proprietary claim to the searched premises located in Hazard, Kentucky, or to the stolen property that was seized. Under such circumstances "[t]he established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Alderman* v. *United States,* 394 U.S. 165, 171-172 (1969), and

[1] Defendant's father, a codefendant, was convicted but did not appeal, the other codefendant was acquitted on a related charge.

at page 173 quoting the rule as stated in *Jones* v. *United States,* 362 U.S. 257, 261 (1960):

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else . . .
>
> "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."

This rule has been stated and consistently followed by this Court in many cases, e.g. *United States* v. *Gregg,* 403 F.2d 222 (6th Cir. 1968), *aff'd.* 394 U.S. 489, *rehearing denied* 395 U.S. 917; *United States* v. *Graham,* 391 F.2d 439 (6th Cir. 1968), *cert. denied,* 393 U.S. 941; *United States* v. *Thomas,* 342 F.2d 132 (6th Cir. 1965), *cert. denied* 382 U.S. 855; *Hardwig* v. *United States,* 23 F.2d 922 (6th Cir. 1928).

The judgment of conviction is affirmed.

APPENDIX B

No. 20,947

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ELISHA COMBS,
Defendant-Appellant.

ORDER

(Filed September 15, 1971)

Before: PHILLIPS, Chief Judge, and EDWARDS and BROOKS, Circuit Judges

Upon consideration, defendant-appellant's petition for rehearing is denied. See Wong Sun v. United States, 371 U.S. 471 (1963); United States v. Lopez, 420 F.2d 313 (2nd Cir. 1969).

It is so ORDERED.

Entered by order of the Court
/s/ JAMES A. HIGGINS, Clerk

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No. 71-517

In the Supreme Court of the United States

OCTOBER TERM, 1971

ELISHA COMBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C., 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-517

ELISHA COMBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted under an indictment charging him with having received, possessed and concealed twenty-six cases of taxpaid whiskey stolen from an interstate shipment, knowing them to have been stolen, in violation of 18 U.S.C. 659.[1] On October 1, 1970, he was sentenced to two years' imprisonment and fined $5,000. The court of appeals affirmed (Pet. App. A).

[1] Petitioner's father, a co-defendant, was convicted but did not appeal; petitioner's brother was acquitted on a related charge.

451-031—71——1

The government's evidence at trial showed that on July 28, 1969, petitioner telephoned one Janet Ballard and asked whether she knew of anyone who wanted to buy some whiskey. Mrs. Ballard said she did; later that day, petitioner delivered approximately forty cases of whiskey to the home of Mrs. Ballard in Newport, Kentucky (Tr. 2–5).

On the following evening, Mrs. Ballard telephoned petitioner and told him to remove the whiskey since she had heard that it was stolen (Tr. 7).[2] Petitioner and James Martin, Mrs. Ballard's brother, then moved the whiskey to the home of petitioner's estranged wife where an additional thirty or forty cases of whiskey were already stored (Tr. 38–40). Later in the same week, Martin received a call from petitioner; he was told that "the heat was on" and that the whiskey would again have to be moved (Tr. 40, 60–63). Martin and petitioner then transported the whiskey to Hazard, Kentucky, where it was stored in an old shed on the property of petitioner's father (Tr. 40–43).

Thereafter, Martin went to the F.B.I. agent assigned to the area and told him of the stolen whiskey (Tr. 45, 51, 112). The agent gave the information to the Kentucky state police; they obtained and executed a warrant to search the father's farm and, pursuant

[2] In the interim, Mrs. Ballard had sold ten cases and had given petitioner the money (Tr. 5, 7).

thereto, seized the twenty-six cases of stolen whiskey involved here (Tr. 100–105). Petitioner, who was not present at the time of the seizure, was later arrested at his home in Newport (Tr. 119–120).

At trial petitioner disclaimed any interest in or knowledge of the whiskey (Tr. 172–173). Defense witnesses, all of whom were members of petitioner's family, testified that the whiskey had been placed in the shed by Martin and one Chapman, who were alleged to have rented the shed from petitioner's mother (Tr. 130, 198, 215, 224).[4]

Prior to trial, petitioner and his co-defendant made a motion to suppress the whiskey on the ground that the search warrant was not supported by probable cause. After an evidentiary hearing, which did not focus on the question of standing, the district judge denied the motion, finding that the affidavit for the search warrant was sufficient. On appeal, the government did not rely on the sufficiency of the affidavit, but asserted for the first time that petitioner had no standing to raise a Fourth Amendment claim since he was not on the property at the time of the search and asserted no interest in the seized whiskey. The court of appeals held that petitioner was without standing.

1. The affidavit for the search warrant was clearly insufficient. It states in pertinent part that the affiant has "reasonable grounds from information from an informant that this whiskey was transported to the

[4] Martin denied having transported the whiskey with Chapman or having rented the shed (Tr. 68–69).

above described premises." This Court has held that such conclusory allegations do not provide the magistrate or judge with enough facts from which to assess the credibility of the matters asserted. *Aguilar* v. *Texas*, 378 U.S. 108.

2. With respect to standing, the question is close and difficult. As far as we can perceive, it is not covered by any prior decision of the Court.

Petitioner argues that *Jones* v. *United States*, 362 U.S. 257, is controlling. There, however, the defendant, who objected to a seizure of narcotics, was on the premises at the time of the unlawful search; he claimed to be a guest of the person who owned the apartment. Here, by contrast, petitioner has shown no interest in the shed where the whiskey was found. It was owned by petitioner's father (Tr. 40–43), and was said to be leased to two men unrelated to petitioner (Tr. 198, 215, 224). Petitioner was not present on the premises at the time of the search, or near the premises at the time the search warrant was executed. Consequently, he is now in no position to claim an interest in the premises sufficient to give him standing to suppress evidence even under the broadest reading of the holding in *Jones*. See, *e.g.*, *Parr* v. *United States*, 255 F. 2d 86 (C.A. 5); and cf. *Stassi* v. *United States*, 410 F. 2d 946 (C.A. 5). He did not claim to be in possession or to be the owner of the whiskey.

Nor is the other aspect of the *Jones* decision, turning on the nature of the crime charged in the indictment, necessarily determinative in this case. In *Jones*, the defendant was charged with unlawful possession

of narcotics; proof of "possession" of the contraband at the time of the search was alone sufficient for conviction. In these circumstances, the Court concluded that, where "possession both convicts and confers standing," the government cannot challenge a Fourth Amendment claim on the ground that the accused had no possessory interest in the premises searched or the property seized (362 U.S. 263). But, this holding has been read narrowly to apply only where proof of possession is alone enough to convict. See *United States* v. *Konigsberg,* 336 F. 2d 844 (C.A. 3). Thus, in *Konigsberg,* the Third Circuit held that *Jones* had no application where "[p]ossession is only one element of the crime charged" (336 F. 2d at 847). That, of course, is precisely the situation here; the theft, interstate commerce, and knowledge of the theft are all matters of proof by the government without which the charge would fall as a matter of law. But see *United States* v. *Price,* 447 F. 2d 23 (C.A. 2); *United States* v. *Cobb,* 432 F. 2d 716, 721 (C.A. 4); *United States* v. *Allsenberrie,* 424 F. 2d 1209, 1213 (C.A. 7); *Colosimo* v. *Perini,* 415 F. 2d 804 (C.A. 6); *Niro* v. *United States,* 388 F. 2d 535, 537 (C.A. 1).

Similarly, this Court's decision in *Simmons* v. *United States,* 390 U.S. 377, is inapplicable. There, the defendant testified at a suppression hearing that he owned the property, in order to establish his standing. The Court refused to suppress the evidence. Thereafter, at the trial on the merits, the defendant's testimony at the suppression hearing was offered and received in evidence, as an admission. This Court held that this was error because it, in effect, forced the

defendant "either to give up what he believed with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination." *Simmons* v. *United States,* 390 U.S. at 394.

Here, we have no such tension between the Fourth and the Fifth Amendments. No prior testimony of the defendant was offered at the trial, so that the *Simmons* case itself is not applicable. Moreover, the position of the defendant throughout was that he did not own the property. He was put under no special risk of perjury, and he did not waive any Fifth Amendment rights. Under *Simmons,* he was free to testify at the suppression hearing that he did own the property, and this testimony could not be used against him at the trial. However, in fact, he made no claim of ownership at the suppression hearing.

It may be that, under these circumstances, the fact alone that the whiskey was found on the premises did not establish that the defendant was then in "possession" of it. However, there was here plenty of other evidence of possession either on these premises, or elsewhere. The evidence provided by the whiskey, though perhaps not sufficient to prove possession by the defendant at the moment of seizure, did fit in with other evidence to show quite clearly that the defendant had been in possession of the whiskey at various times and places, for example, in the process of

transporting it to Hazard, Kentucky, and storing it in petitioner's father's shed.

As we have indicated, the question seems to us to be a close one. However, neither *Jones* nor *Simmons* seems to require a different result than that reached by the court below and there is thus no reason at this time why the decision of the court of appeals should not be allowed to stand.

It is therefore respectfully submitted that a petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971

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Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-517

ELISHA COMBS,

Petitioner,

v.

UNITED STATES.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITIONER'S BRIEF

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Petition for Certiorari Filed October 9, 1971
Certiorari Granted January 10, 1972

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In The

SUPREME COURT OF THE UNITED STATES

No. 71-517

ELISHA COMBS,

Petitioner,

v.

UNITED STATES.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITIONER'S BRIEF

REFERENCE TO OPINIONS BY THE COURT BELOW

The decision of the Sixth Circuit Court of Appeals is officially reported as *United States* v. *Combs*, 446 Fed. (2nd) 515. This opinion is reproduced in full beginning at Page 5 of the "Petition for Writ of Certiorari" filed in this Court on October 9, 1971.

The order denying a "Petition for Rehearing" in the Sixth Circuit Court of Appeals appears at Page 9 of the "Petition for Writ of Certiorari" filed in this Court on October 9, 1971.

GROUNDS FOR JURISDICTION

The "Petition for Rehearing" was denied by the Sixth Circuit Court of Appeals by an order entered on September 15th, 1971. The statutory authority for this appeal

is *28 United States Code, § 1254 (1).* On October 9th, 1971, the "Petition for Writ of Certiorari" was docketed in the United States Supreme Court and assigned No. 71-517.

On January 9th, 1972, an order granting the "Petition for Writ of Certiorari" was entered by this Court.

QUESTION PRESENTED FOR REVIEW

Did the Sixth Circuit Court of Appeals follow *Jones* v. *United States,* 362 U.S. 257 (1960), when it denied standing to challenge a search to the Petitioner when the Petitioner was charged with receiving, possessing and concealing contraband in a Federal Indictment?

STATEMENT OF THE CASE

The Petitioner was indicted by a Federal Grand Jury on a charge that he unlawfully, willfully, and knowingly did receive, possess and conceal certain liquor which had been stolen from Interstate Commerce in violation of *Title 18 U. S. Code, § 659.*

The evidence, twenty-six (26) cases of whiskey, was discovered during a search of a shed on a farm in Hazard, Kentucky, under the color of a search warrant.

The affidavit in support of the search warrant was "clearly insufficient." See: Bottom of Page 3, "Memorandum for the United States in Opposition to Petition for Writ of Certiorari" in the instant case.

Petitioner's standing to challenge the search warrant was not questioned in the proceedings before the District Court Judge.

A "Motion to Suppress the Evidence" because the search warrant was defective, was overruled by the Trial Court Judge.

During the course of the trial on the merits, the Petitioner disclaimed any interest in the premises searched or the property seized.

The Petitioner was found guilty by a jury, and the Court sentenced the Petitioner to two (2) years imprisonment and imposed a fine of Five Thousand ($5,000.00) Dollars.

On appeal to the United States Court of Appeals for the Sixth Circuit, the U. S. Government argued for the first time that Petitioner lacked standing to challenge the search warrant because of his testimony offered during the trial on the merits disclaiming an interest in the premises searched or the property seized.

The Sixth Circuit Court of Appeals accepted the Government's contention that the Defendant lacked standing and affirmed the trial court's judgment of conviction relying upon *Jones* v. *United States,* supra.

The Petitioner sought a rehearing in the Sixth Circuit Court of Appeals which was denied.

On October 9th, 1971, Petitioner filed his "Petition for Writ of Certiorari" in this Court.

On January 9th, 1972, the "Petition for Writ of Certiorari" was granted by this Court.

ARGUMENT

THE SIXTH CIRCUIT COURT OF APPEALS ERRED WHEN IT DENIED STANDING TO THE PETITIONER WHO HAD BEEN INDICTED FOR A CRIME HAVING POSSESSION AS AN ESSENTIAL ELEMENT.

The Petitioner was indicted by a Federal Grand Jury which charged among other things that he unlawfully, willfully, and knowingly did receive, possess, and conceal cer-

tain liquor which had been stolen from Interstate Commerce. See: Appendix, Page 2.

Jones held that when possession of the seized evidence is itself an essential element of the offense with which the Defendant is charged, the Government is precluded from denying that the Defendant has the requisite possessory interest to challenge the admission of the evidence. See: *Simmons* v. *U. S.*, 390 U.S. 377, 390 (1968).

Defendant was charged in an indictment having "possession" as an essential element of the offense.

Therefore, the Government is precluded from denying standing to the Petitioner to challenge the admission of the evidence.

The Government admits that the affidavit for the search warrant was clearly insufficient. The affidavit stated that the "affiant had reasonable grounds from information from an informant that this whiskey was transported to the above described premises." See: Appendix, Page 6. Such an affidavit is fatally defective. See: *Aguilar* v. *Texas*, 378 U.S. 108.

Jones, supra, was interpreted narrowly by the Third Circuit Court of Appeals in *United States* v. *Konigsberg*, 336 Fed. (2nd) 844. The Third Circuit Court of Appeals suggested that when possession is only one of several elements in the crime charged that the Defendant is not automatically conferred standing to attack the validity of a search. In the recent Second Circuit Court of Appeals case, *U. S.* v. *Price*, 447 Fed. (2nd) 23 (July 8th, 1971), the Court collected decisions which have interpreted *Jones* and which have rejected *Konigsberg*.

At Page 28 of the official report, the Court states:

> "The First, Fourth, Fifth and Seventh Circuit have followed *Simmons* in rejecting the limited reading of *Jones*. *United States* v. *Cobb*, 432 Fed. (2nd) 716, (Fourth Circuit 1970); *United States* v. *Allsenberrie*,

424 Fed. (2nd) 1209 (Seventh Circuit, 1970); *Glisson* v. *United States*, 406 Fed. (2nd) 423, 427 (Fifth Circuit, 1969); *Niro* v. *United States*, 388 Fed. (2nd) 536, 535 (First Circuit, 1968)."

The Second Circuit also disposed of the argument advanced by the Government that when testimony at the pre-trial hearing on the "Motion to Suppress" tends to incriminate the Defendant that testimony cannot later be used at the trial in chief.

To that argument the Second Circuit Court of Appeals stated that *Simmons* explicitly re-affirmed the automatic standing of *Jones*. The Second Circuit refused to give the Government the advantage of a conviction based on inconsistent positions which a Defendant may be forced to adopt.

It is significant in the instant case that the Petitioner's standing to attack the validity of the search warrant was not raised during the course of the proceedings before the District Court.

This is unlike the situation which occurred in *Jones*, supra. In *Jones* prior to the trial, the Petitioner duly moved to suppress evidence obtained through the execution of a search warrant on the ground that the warrant had been issued without a showing of probable cause.

The Government challenged the Petitioner's standing to make this motion because Petitioner alleged neither ownership of the articles seized nor an interest in the apartment greater than that of an invitee or guest. The District Court in *Jones* then agreed to take evidence on the issue of Petitioner's standing.

The Petitioner in the instant case never had his standing to challenge the search warrant questioned by the Government.

During the trial in chief, the Petitioner disclaimed in-

terest in the premises searched or the property found as the result of the search. The Government's contention appears to be that the evidence disclosed at the trial somehow relates back to the hearing on the pre-trial "Motion to Suppress Evidence" and denies the Petitioner standing.

Simmons, supra, announced a further rule that any admissions of the Defendant during the course of the pre-trial hearing on the "Motion to Suppress" could not be used against him at the trial in chief.

However, the Government in the instant case seems to argue that admissions made at the trial in chief by the Defendant may somehow be used to deny him standing, after the fact as it were, at the motion for suppression of evidence conducted before the trial in chief. Such a result is not supported by *Simmons*.

CONCLUSION

For the reasons stated herein, Petitoner respectfully requests this Court to vacate the proceedings below to determine that the search warrant is defective and further orders the suppression of the evidence seized under the color of the defective search warrant, and finally a new trial.

Respectfully submitted,

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Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 71-617

In the Supreme Court of the United States

OCTOBER TERM, 1971

ELISHA COMBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-517

ELISHA COMBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 446 F. 2d 515.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1971. A petition for rehearing was denied on September 15, 1971. The petition for a writ of certiorari was filed on October 9, 1971; it was granted on January 10, 1972 (App. 33). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether one charged with possession of stolen property should, by virtue of that fact alone, be accorded automatic standing to challenge a search for or seizure of that property.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted under an indictment charging him with having received, possessed and concealed twenty-six cases of taxpaid whiskey stolen from an interstate shipment, knowing them to have been stolen, in violation of 18 U.S.C. 659.[1] On October 1, 1970, he was sentenced to two years' imprisonment

[1] Petitioner's father, a co-defendant, was convicted but did not appeal; petitioner's brother was acquitted on a related charge.

and fined $5,000. The court of appeals affirmed *per curiam* (Pet. App. A).

1. The government's evidence at trial showed that, on July 28, 1969, petitioner telephoned one Janet Ballard and asked whether she knew of anyone who wanted to buy some whiskey. Mrs. Ballard said that she did, and later that day petitioner delivered approximately forty cases of whiskey to the home of Mrs. Ballard in Newport, Kentucky (Tr. 2-5).[2]

The following evening, Mrs. Ballard telephoned petitioner and told him to remove the whiskey since she had heard that it was stolen (Tr. 7).[3] Petitioner and one James Martin, Mrs. Ballard's brother, then moved the whiskey to the basement of the home of petitioner's estranged wife, where an additional thirty or forty cases of whiskey were already stored (Tr. 38-40). Later that same week, Martin received a telephone call from petitioner; he was told that "the heat was on" and that the whiskey would again have to be moved (Tr. 40, 60-63). He and petitioner then went to the house where the whiskey was stored, loaded all the cases onto a pick-up truck, and transported the whiskey to Hazard, Kentucky; the cases were placed in an old shed on the property of petitioner's father (Tr. 40-43, 132).

Thereafter, Martin went to the F.B.I. agent assigned to the area and told him of the stolen whiskey.

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[2] "Tr." references are to the transcript of trial proceedings in the district court, a copy of which is on file with the Clerk of this Court.

[3] In the interim, Mrs. Ballard had sold ten cases and had given petitioner the money (Tr. 5, 7).

(Tr. 45, 51, 112). The agent gave the information to the Kentucky state police; they obtained and executed a warrant to search the father's farm. Pursuant thereto, the police seized the twenty-six cases of stolen whiskey involved here (Tr. 100-106). Petitioner, who was not present at the time of the seizure, was later arrested at his home in Newport (Tr. 119-120).

2. Petitioner took the stand at his trial and disclaimed any interest in the whiskey (Tr. 172-173, 179, 194). Other defense witnesses, all of whom were members of petitioner's family, testified that the whiskey had been placed in the shed by Martin and one Chapman, who were alleged to have earlier rented the shed from petitioner's mother (Tr. 105, 130, 198, 215, 224-225).[4] Martin denied that he had rented the shed, and also that Chapman had been involved in transporting the whiskey (Tr. 68-70).

3. Prior to trial, petitioner and his co-defendant moved to suppress the whiskey on the ground that the search warrant had not been supported by probable cause. Following a hearing which did not focus on the question of standing, the district judge denied the motion, finding that the affidavit for the search warrant was legally sufficient. On appeal, the government did not rely on the sufficiency of the affi-

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[4] At the time of the search, petitioner's mother produced an undated receipt indicating that the shed had been rented to Martin and Chapman for storage purposes for three months (Tr. 105). At trial, she testified that she had rented the shed to Martin on July 31 or August 1, 1969 (Tr. 197-199).

davit,[5] but asserted that petitioner had no standing to raise a Fourth Amendment claim since he was not on the property at the time of the search and claimed no interest in the seized whiskey. The court of appeals (Pet. App. A) held that petitioner was without standing to challenge the search, and accordingly affirmed the conviction. It denied a petition for rehearing (Pet. App. B).

SUMMARY OF ARGUMENT

I

In *Jones* v. *United States*, 362 U.S. 257, this Court held, *inter alia*, that one charged with a possessory crime would, by virtue of that charge alone, be accorded standing to move to suppress evidence allegedly obtained by an illegal search or seizure. This automatic standing rule merits reexamination in light of subsequent decisions by this Court that undercut some of the reasoning sustaining it. The present case provides an appropriate occasion to consider whether, as to one whose Fourth Amendment claim is grounded on the unlawful seizure of stolen goods, an application of the automatic standing rule either furthers

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[5] The affidavit for the search warrant was, as we conceded in response to the petition for a writ of certiorari, clearly insufficient. It stated in pertinent part that the affiant has "reasonable grounds from information from an informant that this whiskey was transported to the above described premises." This Court has held that such conclusory allegations do not provide the magistrate or judge with enough facts from which to assess the accuracy of the matters asserted. *Aguilar* v. *Texas*, 378 U.S. 108.

the overriding purpose of the Fourth Amendment, or is required under the dual rationale set forth in *Jones*. On both aspects of the question, our response is no.

II

The fundamental purpose of the Fourth Amendment is to protect individual privacy. See *Katz* v. *United States*, 389 U.S. 347. It is this concept, rather than the nature of the criminal charge, that we believe should be controlling on the question of standing to move to suppress. The essential inquiry is whether the accused "himself was the victim of an invasion of privacy" (*Alderman* v. *United States*, 394 U.S. 165, 173), that is, whether the challenged search or seizure intruded upon his own "person," "papers," or "effects," or invaded premises in which he had a sufficient Fourth Amendment interest.

It is our position that, to satisfy the constitutional standard, it is not enough for the accused to point only to a seizure from remote premises of stolen property with respect to which he had constructive possession. As to such property, it can reasonably be expected that efforts will be made by the authorities to apprehend the stolen goods and return them to the rightful owner. (Compare *Mancusi* v. *DeForte*, 392 U.S. 364, 368.) They thus carry with them no legitimate expectation of privacy in the hands of a wrongful possessor. Certainly, the values sought to be protected by the Fourth Amendment are not "served by holding that a thief who has left evidence of his crime on the premises of a confeder-

ate is subrogated to the latter's right to complain of a search and seizure * * *" (*United States* v. *Bozza*, 365 F.2d 206, 223 (C.A. 2)).

Nor do we think that the dual rationale of *Jones* requires a different result because the underlying criminal charge in this case includes "possession" as an element of the offense. No longer does a defendant need to worry that to vindicate his Fourth Amendment rights on a motion to suppress he might have virtually to admit his guilt of the offense charged. Such a "dilemma," which partially sustained the automatic standing rule of *Jones*, has essentially been eliminated by this Court's subsequent decision in *Simmons* v. *United States*, 390 U.S. 377, precluding the prosecution's use against a defendant at trial of testimony offered to establish his standing on a suppression motion. While *Simmons* arose in the context of a prosecution for a non-possessory offense, we think that the use-restriction rule enunciated therein has equal application with respect to the possessory charge involved here.

This leaves only the question whether, by not conferring automatic standing in the present case, the government is, as the Court stated in *Jones*, permitted "to have the advantage of contradictory positions as a basis for conviction" (362 U.S. at 263). We do not think so. Proof of petitioner's knowing possession of the stolen whiskey is essential to the government's case in chief; but the government need not refute possession in order to succeed on the question of standing under the Fourth Amendment. Since pe-

titioner's possession was wrongful, it does not alone provide a basis for a constitutional claim of invasion of individual privacy. Instead, to sustain his standing, petitioner must show some intrusion upon the privacy of his own person, papers or effects, or upon private premises in which he has a sufficient Fourth Amendment interest. There is no inconsistency in the government's asserting before the jury on the issue of guilt that the petitioner had possession of the stolen whiskey, while requiring the petitioner, on a motion to suppress, to demonstrate that some legitimate expectation of privacy on his part was invaded by the search and seizure.

III

There has been no testimony in this case on the issue of standing before the district court, because the district judge ruled on the merits that the affidavit for the search warrant pursuant to which the stolen whiskey was seized was invalid. In view of the government's concession to the contrary (both in the court below and here), it seems appropriate that the instant case be remanded to the district court for a determination of the question whether petitioner was a victim of an invasion of privacy with respect to the seizure of the stolen whiskey.

ARGUMENT

I. Introduction

"The problem of standing in Fourth Amendment cases has for a considerable period of years been trou-

blesome to courts and commentators." *United States* v. *West*, C.A. 3, No. 71-1687, decided January 21, 1972, slip op. at pp. 3-4. The issue is not only, as pointed out by the Third Circuit in *West* (slip op. at p. 4 n. 4a), "inextricably bound to the philosophical underpinning of the application of the exclusionary rule as a means of enforcing the Fourth Amendment"; it is also as firmly riveted to the underlying philosophy of the Fourth Amendment itself. In the context of the present case, the question of standing is a difficult one. To dispose of it summarily by an uncritical reference to this Court's decision in *Jones* v. *United States*, 362 U.S. 257, as petitioner has done, fails to come to grips with the conceptual problems that flow from an indiscriminate application of *Jones* in the present circumstances.

Since filing our Memorandum in Opposition to the petition for a writ of certiorari, we have had an opportunity to reconsider fully the question of standing in relation to the Fourth Amendment. We now are of the view that this is a proper occasion to ask this Court to modify the standing rule that it laid down in *Jones* and reiterated to some extent in *Simmons* v. *United States*, 390 U.S. 377. It is our position that, in view of the essential purpose of the Fourth Amendment to protect individual privacy (*Katz* v. *United States*, 389 U.S. 347, 351), a person who is charged with possession of stolen property can have no reasonable expectation of privacy with respect to that property; he therefore ought not to be ac-

corded standing, by virtue of the "possessory" charge alone, to challenge the validity of the search and seizure. He should, instead, be permitted to assert such a challenge only if the search and seizure takes place under circumstances otherwise amounting to an invasion of his legitimate expectation of privacy.

II. Since One In Possession of Stolen Property Has No Reasonable Expectation of Privacy Therein, the Charge of Possession of Such Property Should Not Alone Confer Standing To Move To Suppress

A. *The Bifurcated Holding in* Jones

Any consideration of standing on a motion to suppress must start with the fundamental question of the nature of the right protected by the Fourth Amendment. In *Katz* v. *United States*, 389 U.S. 347, 351, this Court recently spoke directly to that point:

> * * * the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. * * * But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. * * *

1. *The defendant's presence.* Viewing Fourth Amendment interests in that perspective, we think that there can be little dispute with this Court's finding in *Jones*, *supra*, 362 U.S. at 265-267, that lower courts had theretofore adopted too narrow a view of the interest in searched premises for purposes of con-

ferring standing to maintain a suppression motion.* We therefore do not question the essential soundness of the *Jones* ruling that (362 U.S. at 267):

> [A]nyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched. * * *

This case, however, in its present posture, does not involve that aspect of the *Jones* decision (but see pp. 40-41, *infra*). The search here did not take place on petitioner's premises, but on the premises of his father (Tr. 40-43). At the time that occurred, petitioner was neither living with, nor visiting, his parents. He was not present when the stolen whiskey was seized, nor was he near the shed where it was stored. Indeed, the shed was said to be leased at the time to two men unrelated to petitioner (Tr. 198, 215, 224), one of whom, James Martin, had been the informant who directed F.B.I. agents to the stolen property.

2. *The possessory offense.* In such circumstances, petitioner's claim of standing to raise a Fourth Amendment objection must rest on this Court's sep-

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* In *Jones*, narcotics were found pursuant to the execution of a search warrant directed to an apartment in which petitioner had no interest greater than an invitee or guest. The two lower courts, following what then seemed to be the prevailing authority in the courts of appeals, held that, since the defendant had no property interest in the premises, he lacked standing to challenge the validity of the search warrant.

arate ground for its decision in *Jones*, *i.e.*, that the return of an indictment charging him with a "possessory" crime is itself enough to confer standing to challenge the validity of a search for and seizure of the thing illegally possessed (362 U.S. at 263-264). When considered in light of subsequent decisions of this Court, the dual rationale sustaining that proposition has little application to the precise situation presented here, and neither the overriding purpose of the Fourth Amendment, nor the "philosophical underpinning" of the exclusionary rule (*United States* v. *West*, *supra*, slip op. at p. 4 n. 4a), are, we submit, furthered by an application of an automatic standing rule in the circumstances of this case.

a. In *Jones*, the defendant was charged with narcotics offenses (21 U.S.C. (1964 ed.) 174, 26 U.S.C. (1964 ed.) 4704(a)) which, because of statutory presumptions, permitted conviction upon proof of knowing possession alone.[7] Observing that such prosecutions "have presented a special problem" (362 U.S. at 261) for defendants with Fourth Amendment claims, the Court explained (362 U.S. at 261-262) that "a defendant seeking to comply with what has been the conventional standing requirement has been forced to allege facts the proof of which would tend, if indeed not be sufficient, to convict him." In the words of Mr. Justice Frankfurter, speaking for the Court (362 U.S. at 262):

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[7] While *Jones* involved contraband property, whereas the present case is concerned with stolen property, we do not perceive any basis for distinction on that ground.

> At the least, such a defendant has been placed in the criminally tendentious position of explaining his possession of the premises. He has been faced, not only with the chance that the allegations made on the motion to suppress may be used against him at the trial, although that they may is by no means an inevitable holding, but also with the encouragement that he perjure himself if he seeks to establish "standing" while maintaining a defense to the charge of possession.

It was this "dilemma" (362 U.S. at 262) which in part prompted the enunciation in *Jones* of an automatic standing rule in cases involving possessory crimes.

But the "dilemma" rationale was not alone advanced as ground for ruling that a criminal charge of possession in itself confers standing under the Fourth Amendment. The Court also stated (362 U.S. at 263): "* * * we are persuaded by this consideration: to hold to the contrary, that is, to hold that [the defendant's] failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction." Expanding on this alternative "inconsistent government positions" rationale, the Court reasoned (362 U.S. at 263-264):

> [The defendant's] conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that [defendant] did not have pos-

> session of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government. The possession on the basis of which [defendant] is to be and was convicted suffices to give him standing under any fair and rational conception of the requirements of Rule 41(e) [Fed.R.Crim. P.].[8]

b. Many of the decisions in the lower courts since *Jones* seem to us to have applied its automatic standing rule mechanically without considering either the dual rationale of the *Jones* decision or the fundamental purpose of the Fourth Amendment. Attention has often focused on a matter which we do not consider germane to Fourth Amendment issues, *i.e.*, whether possession was or was not an element of the offenses charged.[9]

The crimes with which the defendant was charged

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[8] Rule 41(e), Fed. R. Crim. P. is "a statutory direction governing the suppression of evidence acquired in violation of the conditions validating a search" (*Jones* v. *United States*, *supra*, 362 U.S. at 260). As this Court pointed out in *Alderman* v. *United States*, 394 U.S. 165, 173 n. 6: "*Jones* thus makes clear that Rule 41 conforms to the general standard and is no broader than the constitutional rule."

[9] In our Memorandum in Opposition to the certiorari petition (pp. 4-5), we intimated that this consideration might be relevant to the standing question. But, for the reasons set forth *infra*, further reflection has persuaded us that it should have no bearing on the issue now before this Court.

in *Jones* were unusual in that possession of the property seized was not merely an element of the offense —as is the case here, for example (18 U.S.C. 659)— but was alone sufficient for conviction. Shortly after *Jones*, two courts of appeals reached opposite conclusions as to the applicability of the automatic standing holding in *Jones* with respect to a person charged with possession of goods stolen from an interstate shipment (18 U.S.C. 659). In *United States* v. *Konigsberg*, 336 F. 2d 844, 847 (C.A. 3), certiorari denied, 379 U.S. 933, the Third Circuit, as an alternative basis for its denial of standing to the defendant, interpreted *Jones* as limited to the situation where "possession" was alone sufficient to convict. Thereafter, the First Circuit, taking explicit notice of *Konigsberg*, disagreed; in *Niro* v. *United States*, 388 F. 2d 535, 537 (C.A. 1), it held that the *Jones* rule was applicable even though possession was only one element of the offense charged. See also *Simpson* v. *United States*, 346 F. 2d 291, 295 (C.A. 10).

This conflict was for most courts of appeals later deemed settled by the considered dicta of this Court in *Simmons* v. *United States*, 390 U.S. 377. That case involved a conviction of two defendants, Simmons and Garrett, for the armed robbery of a federally insured savings and loan association (18 U.S.C. 2113), a non-possessory offense. The question pertinent to this case which the Court decided was not one of "standing," but whether the government had been properly permitted at trial to introduce against Garrett on the issue of guilt the testimony previously given by him upon his unsuccessful motion to suppress

evidence on grounds of illegal search and seizure. While we will turn shortly to the Court's treatment of that issue (see *infra*, pp. 34-38), since we think it bears on the "dilemma" rationale advanced in *Jones*, it is enough here to point out what was said in *Simmons* with respect to the automatic standing rule. Summarizing the possessory aspect of its earlier decision in *Jones*, the Court stated (390 U.S. at 390): "* * * we held that when, as in *Jones*, possession of the seized evidence is itself *an essential element of the offense* with which the defendant is charged, the government is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of the evidence" (emphasis added).

Based in large part on this statement, a number of courts of appeals which have since had occasion to consider the issue that had previously divided the Third and First Circuits[10] have uniformly aligned themselves with the First Circuit's decision in *Niro*—*i.e.*, that the *Jones* rule of automatic standing applies to all types of possessory offenses—and have specifically disapproved the holding in *Konigsberg*. See, *e.g.*, *United States* v. *Price*, 447 F. 2d 23, 28-29 (C.A. 2); *United States* v. *Cobb*, 432 F. 2d 716, 719-722 (C.A. 4); *Glisson* v. *United States*, 406 F. 2d 423, 425-426 (C.A. 5); *United States* v. *Allsenberrie*, 424 F. 2d 1209, 1213-1214 (C.A. 7). See also *Baker* v. *United States*, 401 F. 2d 958, 982 (C.A.D.C.) (dictum); *Kuhl* v. *United States*, 370 F. 2d 20, 34-36 (C.A. 9)

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[10] In *United States* v. *West*, *supra*, the Third Circuit in effect abandoned its *Konigsberg* ruling.

(*en banc;* opinion of four judges dissenting).[11] The same conclusion was reached by the Sixth Circuit (which decided the instant case) in *Colosimo* v. *Perini*, 415 F. 2d 804 (C.A. 6).

c. It is our view, however, that the fact that possession is an "element of the offense" should not alone accord an accused standing to challenge the lawfulness of a search and seizure. Not infrequently, that consideration seems to us to have little relevancy to the dual rationale sustaining the standing rule in *Jones*, *i.e.*, the dilemma of the defendant, on the one hand, and inconsistent government positions, on the other.

If, for example, an unlawful search occurs sometime after the defendant has parted with possession of the property seized, at a place in which the defendant has no interest and at a time when he is not present, we see no reason why the fact that he is charged with being in possession of that property at some earlier time should preclude the government from challenging his standing to raise a Fourth Amendment claim. With respect to the search and seizure, he is essentially in no different position from that of any stranger asserting a right to suppress, and thus he should be required to show some basis for claiming an invasion of privacy.[12] Nor do we

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[11] The majority did not reach the issue.

[12] If, contrary to the position we urge *infra*, the automatic standing rule were applied whenever "possession" is alleged to be contemporaneous with the search and seizure, it might be argued that to create a different rule for circumstances in which the seizure occurs after possession terminates would place an accused in the *Jones* "dilemma" by forcing him to

think that this would place the government in a posture which requires the assertion of "inconsistent * * * positions." There surely is nothing contradictory about arguing, on the one hand, that the defendant had no interest in either property or premises at the time of the search and seizure, and contending, on the other hand, that he was in possession of the seized property at some earlier time for purposes of proving the offense charged.

d. We therefore do not think it necessarily follows from the fact that the government charges possession as an element of the crime that the rationale of *Jones* concerning possession warrants an application of the automatic standing rule for Fourth Amendment purposes.[18] To urge otherwise without any analysis of

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assert contemporaneous possession. But, as we suggest below, the use-restriction rule laid down in *Simmons* can be applied to extricate a defendant from such a dilemma.

[18] We think it is not inappropriate to read *Wong Sun* v. *United States*, 371 U.S. 471, as supporting this conclusion. In that case, two defendants, Wong Sun and Toy, were convicted of having knowingly transported and concealed illegally imported heroin, in violation of 21 U.S.C. (1964 ed.) 174, one of the statutes involved in *Jones*. The narcotics had been obtained by federal agents from one Yee, whom the agents had learned of through a statement unlawfully elicted from Toy. When Yee surrendered the drugs, he implicated Wong Sun. As to Toy, the Court held that the narcotics should have been excluded as the product of the statement illegally elicited from him by the agent. But, with respect to Wong Sun, the Court sustained the introduction of the narcotics, finding no invasion of Wong Sun's privacy. Noting that Wong Sun, unlike the defendant in *Jones*, was not "lawfully on [Yee's] premises at the time of the search" (371 U.S. at 492 n. 18), the Court held (371 U.S. at 492): "The seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial." Apparently little

competing considerations, as petitioner has done here, not only ignores certain pronouncements of this Court since *Jones* that undercut some of its reasoning, but also overlooks what we view as fundamental to any inquiry under the Fourth Amendment, *i.e.*, whether at the time of the search and seizure there was any invasion of this defendant's legitimate expectation of privacy.[14] To be sure, the instant case does not present the standing issue in the precise context hypothesized above;[15] here the wrongful possession with

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significance was attached to the fact that possession was an element of the offense with which Wong Sun was charged. Although no explanation was given in the opinion, it seems to us likely that the Court recognized that, notwithstanding the possessory charge, an application of the automatic standing rule of *Jones* made little sense in the circumstances, since Wong Sun had plainly parted with possession of the heroin at the time that it was seized from Yee.

If our reading of *Wong Sun* is correct, the case represents what we believe to be a reasonable limitation on the automatic standing rule of *Jones*. It is, moreover, fully consistent with the result we urge here—*i.e.*, that the question of standing to suppress evidence, when it relates to a defendant charged with a possessory crime, should turn, not simply on the nature of the charge, but on whether the challenged search and seizure invaded a legitimate expectation of the defendant's privacy. Compare *United States* v. *Lopez*, 420 F. 2d 313 (C.A. 2), involving a non-possessory offense, where the court in dictum indicated that *Jones* should be read in light of *Wong Sun* (420 F. 2d at 316-317).

[14] If this question can be answered affirmatively, the reasonableness of that invasion is, of course, a matter that goes to the merits of the motion to suppress, rather than to the question of standing to raise the motion.

[15] The standing issue is now before the Court in that context in *Brown and Smith* v. *United States*, pending on petition for

which petitioner was charged coincided with the seizure of the property, rather than occurring only at some earlier point in time.[16] But, because that property was stolen goods, it is our position that petitioner should not be entitled to standing simply because the government charged him with a possessory crime.

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a writ of certiorari, No. 71-6193, this Term. We are urging the Court to defer action in that case until the instant case has been decided. In *Brown and Smith*, the Sixth Circuit held that defendants were without standing to raise a Fourth Amendment claim. A recent decision by the Second Circuit, *United States* v. *Price*, 447 F. 2d 23 (C.A. 2), also involving a motion to suppress by a defendant charged with a possessory crime, reached the opposite result. There the court applied the automatic standing rule of *Jones* despite the fact that the defendant had relinquished all control over the goods in question well before the time of the challenged search and seizure. Since *Price* involved stolen property, it will, of course, have little vitality if this Court agrees with our position in the instant case. Should the Court disagree with us here, however, the conflict between *Brown and Smith* and *Price* with respect to the question of standing in that separate context might well remain unresolved.

[16] In its original opinion in this case, the court below seemingly did not realize that petitioner had been charged, among other things, with *possession* of the stolen property. It described the indictment and conviction as involving only "receiving and concealing taxpaid whiskey stolen from an interstate shipment" (446 F. 2d 515). In a petition for rehearing, petitioner expressly called the attention of the court of appeals to the fact that he had been charged with possession and invoked the automatic standing rule in *Jones*. The court responded by denying the rehearing petition (Pet. App. B) with a citation to *Wong Sun*, *supra*, and to the Second Circuit decision in *United States* v. *Lopez*, *supra*.

B. *The Case Against the Automatic Standing Rule*

We come, then, to what we deem to be the crucial inquiry presented here, *i.e.*, whether it is consonant with the underlying philosophy of the Fourth Amendment to accord automatic standing under *Jones* to persons charged with knowing possession of stolen property. We think not.

1. *The protected right of privacy.* As pointed out earlier, the essential purpose of the Fourth Amendment is to protect privacy. See *Katz* v. *United States*, 389 U.S. 347. Thus, this Court has long held that only persons injured in their privacy by a search and seizure have standing to challenge its validity. The Court's basic doctrine in the "standing" field—which we do not challenge—was most recently expressed in *Alderman* v. *United States*, *supra*, 394 U.S. at 173, where the Court, quoting from *Jones* (362 U.S. at 261), stated:

> * * * "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else * * *."
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> "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."

The same concept, that a person must have been "the victim of an invasion of privacy" in order to have "standing" under the Fourth Amendment, was set forth in *Mancusi* v. *DeForte*, 392 U.S. 364. That case involved a seizure without a warrant of union records from an office shared by DeForte with union officers while DeForte was present and had custody of the records, and over his protest. The Court stated (392 U.S. at 367-368; footnote omitted):

> We deal, first, with the question of "standing." * * * It was settled even before our decision in *Jones* * * * that one with a possessory interest in the premises might have standing. See, *e.g.*, *United States* v. *Jeffers*, 342 U.S. 48. In *Jones*, even that requirement was loosened, and we held that "anyone legitimately on premises where a search occurs may challenge its legality * * * when its fruits are proposed to be used against him." 362 U.S. at 267. The Court's recent decision in *Katz* v. *United States*, 389 U.S. 347, makes it clear that capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion. * * *

The Court held that DeForte's office was a place in which he "could reasonably have expected that only those persons [other union officials with whom he shared the office] and their personal or business guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups" (392 U.S. at 369).

2. *Possession of stolen goods.* We have no disagreement with the general test of "standing" to suppress that a person be the "victim of an invasion of privacy" (*Alderman* v. *United States*, *supra*, 394 U.S. at 173). Nor do we doubt, given the Fourth Amendment's protection of "papers and effects", that one has standing to challenge a search directed at his lawfully owned property, even in the absence of any intrusion on his person or on premises in which he has a sufficient interest. We do urge however, that a person who possesses stolen property cannot be said to have a "reasonable expectation of freedom from governmental intrusion" (*Mancusi* v. *DeForte*, *supra*, 392 U.S. at 368) with respect to that property such as to make him the "victim" of a search or seizure for "standing" purposes when the seizure of the property occurs, as may be true here, in an area where he otherwise has no legitimate expectation of privacy.[17]

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[17] There may be some question whether one who claims that he innocently possessed the stolen property, not knowing it to be stolen, can be deemed to be a "victim" of a search and seizure for standing purposes. Since it is still stolen property, he plainly is in no better position to assert an actual possessory interest in such property as his personal "effects" under the Fourth Amendment. But, perhaps it could be argued that, because he had no reason to know that the property was stolen, he should be deemed to have had a legitimate expectation of privacy therein for standing purposes.

The question does not seem to be presented in this case, since petitioner has been convicted of knowing possession, and his defense at trial was that he did not possess the whiskey at all (Tr. 172-173, 179, 194). Moreover, even if he were now to assert innocent possession—assuming *arguendo* that

Indeed, the Second Circuit recently so held in *United States* v. *Sacco*, 436 F. 2d 780 (C.A. 2), involving a charge of conspiracy to transport in interstate commerce stolen goods (T.V. sets), knowing them to have been stolen. Sacco had stored the television sets in the basement of premises owned by another; they had been found there by the police pursuant to the execution of a search warrant for the premises. In denying Sacco standing to move to suppress the stolen property on the ground that the affidavit on the basis of which the search warrant had been issued was insufficient, the court of appeals pointed out that he had no legitimate expectation of privacy with respect to the premises searched and had not been present at the time of the seizure (436 F. 2d at 784). "His claim," it stated (*ibid.*), "amounts to the contention that he had a sufficient possessory interest in the stolen goods to entitle him to object to their seizure." This argument was flatly rejected on the authority of *United States* v. *Lopez*, *supra*, and *United States* v. *Bozza*, 365 F. 2d 206 (C.A. 2). As Judge Friendly pointed out in the *Bozza* case, the values sought to be protected by the Fourth Amendment are not "served by holding that a thief who has left evidence of his crime on the premises of a confederate is subrogated

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he would have standing to raise such a claim under the Fourth Amendment—that would not alter our position here. Petitioner still should not be accorded automatic standing under *Jones*, but, for the reasons stated herein, should be required to come forward and establish his "standing" at the suppression hearing by satisfactorily demonstrating his lack of knowledge that the property was stolen. See n. 27, *infra*.

to the latter's right to complain of a search and seizure * * *" (365 F.2d at 223). And see *Palmer* v. *State of Maryland*, Md. Ct. of Spec. App., No. 250, decided January 27, 1972, 286 A.2d 572.[18]

Nor should it be relevant for Fourth Amendment purposes that the defendant in *Sacco* had been charged with a non-possessory crime. If he did not have a sufficient Fourth Amendment interest in the stolen property at the time of the search to afford him standing under the conspiracy charge, we fail to see how, as a matter of constitutional law, he is in a position to assert any greater Fourth Amendment interest under some other charge.

In *United States* v. *Jones*, *supra*, this Court noted that those whose presence on the searched premises is "wrongful" cannot invoke the privacy of the premises (362 U.S. at 267). See also *United States* v. *Cole*, 416 F.2d 827 (C.A. 6), certiorari denied, 397 U.S. 1027 (trespasser has no standing). By the same reasoning, we think that those whose possession of per-

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[18] In *Palmer*, the Maryland court considered the question of standing of a thief to challenge the search of a stolen automobile in which he was riding at the time of apprehension. In a learned opinion, the court denied standing, stating (286 A.2d at 578): "Both the overwhelming weight of authority and, we feel, the better reasoning are represented by the cases which hold squarely that the thief has no 'standing' in the stolen automobile * * *. Even more compelling than the precedents from our sister jurisdictions, however, is the inherent logic of the proposition. No valuable social purpose could conceivably be served by extending the protection of the Fourth Amendment to a thief in the enjoyment of the stolen automobile" (footnote omitted).

sonal property is "wrongful," because it is stolen merchandise, should not be permitted to claim a legitimate Fourth Amendment interest in that property. Otherwise, a trespasser who has hidden stolen goods on a stranger's premises would, by virtue of his claimed interest in the hidden property alone, be on an equal footing for purposes or standing under the Fourth Amendment with one "legitimately on premises where a search occur[red]" (*Jones*, *supra*, 362 U.S. at 267). Mere possession alone, if "wrongful," should no more serve as a basis for asserting an invasion of privacy than does mere presence alone, when it is "wrongful." [19]

In this regard, it is relevant to point out that, prior to this Court's formulation of the exclusionary rule (see, *e.g.*, *Boyd* v. *United States*, 116 U.S. 616; *Weeks* v. *United States*, 232 U.S. 383), the typical

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[19] This Court in a related context has indicated that, under the Fourth Amendment's flexible standard of reasonableness (see *Camara* v. *Municipal Court*, 387 U.S. 523, 534-539), searches for and seizures of stolen goods, where the government is entitled to recover the property, may require less justification than where the property seized is the person's own personal effects. See *Davis* v. *United States*, 328 U.S. 582, 590-591, 593; *Boyd* v. *United States*, 116 U.S. 616, 623-624. This, we think, connotes an implicit recognition that no substantial right of privacy should attach to the possessor of articles merely by virtue of his "wrongful" possession. Thus, the rule with respect to the quantum of reasonableness needed to justify a search or seizure of stolen property where "standing" is independently established is consistent with our position that an individual cannot, by virtue solely of his knowing, wrongful possession of stolen articles, claim standing to challenge the search or seizure of that property.

means of asserting a claim of invasion of privacy due to an interference with property rights by law enforcement officers was by way of a common law action of trespass or conversion for damages or return of the property. See, *e.g.*, *Entick* v. *Carrington*, 19 Howell St. Tr. 1029 (trespass action); *Banks* v. *Farwell*, 21 Pick. 156 (Mass.) (same); *Oviatt* v. *Pond*, 29 Conn. 479 (Sup. Ct. of Errors, New Haven Cty.) (conversion action).[20] But recovery in such suits was premised on a showing by the plaintiff that he was, at the time of the wrongful intrusion, not only in possession of the property seized or injured, but also that he had some colorable claim of right to it. "No court ever has allowed an admitted, or even a clearly proved, thief without a claim of right to recover * * *." Prosser, *Torts* (3d ed.) 95; and see *id.* at 78 n. 55. Surely, one in possession of stolen property should be in no different position under the exclusionary rule to assert a claim of invasion of privacy with respect to the seizure of that property than he is in an action to recover damages grounded on the same claim. Compare *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388.

3. *United States* v. *Jeffers and the exclusionary rule.* This, of course, does not mean that, whenever stolen property is searched for or seized, the possessor thereof has no standing to complain; our position is

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[20] At common law the admissibility of the evidence was not affected by the illegality of the means by which it was obtained. See *Adams* v. *New York*, 192 U.S. 585, 594-595; and see VIII Wigmore, *Evidence* (McNaughton rev. 1961) § 2183.

simply that the "standing" of such a person in terms of the Fourth Amendment must depend on some invasion of his right of privacy other than that deemed to arise from his wrongful possession alone. Thus, if the search or seizure takes place in his home or office, for example, or on the premises of another where he is and has a right to be, he would have standing. Similarly, if his person were searched he would have standing. But the thief who secretes property he has stolen in an open field, or on someone else's premises without permission, has, we submit, suffered no infringement of any legitimate expectation of privacy at the time that the property is seized and should not be heard to complain.

a. We recognize that there is language in *United States* v. *Jeffers*, 342 U.S. 48, that seems to point the other way, but we do not read that decision as being inconsistent on its facts with the result we urge here. In *Jeffers*, the defendant, who was charged with narcotics offenses (see n. 7, *supra*), moved to suppress quantities of cocaine seized without a search warrant from a hotel room leased to his two aunts. At the pretrial hearing, it was established that the aunts "had given [defendant] a key to their room, that he had their permission to use the room at will, and that he often entered the room for various purposes" (342 U.S. at 50). In these circumstances, the defendant had an interest in the hotel room at the time of the search sufficient to support a reasonable expectation of privacy as to goods he left there.

In *Jones, supra*, this Court extended "standing" for Fourth Amendment purposes to those who were "legitimately *on* premises where a search occurs" (362 U.S. 267, emphasis added). Since then, this Court and others have properly broadened the doctrine to include those who, while having no property right in the premises searched and not being present when the search occurs, nevertheless have a right as invitees to occupancy of the premises at the time in question. See *Alderman* v. *United States*, 394 U.S. 165; *Baker* v. *United States*, 401 F. 2d 958, 981-984 (C.A. D.C.). This, of course, would include the defendant in *Jeffers*. Thus, as the Court explicitly pointed out in *Mancusi* v. *DeForte, supra*, 392 U.S. at 368, *Jeffers* can properly be read as conferring standing to suppress on the ground that the defendant had a sufficient "possessory interest in the premises" to object to the unlawful search of the hotel room. And see *Jones* v. *United States, supra*, 362 U.S. at 266.

To be sure, the government argued in *Jeffers* that, because the seized narcotic was contraband, the defendant had an insufficient property interest therein to give him standing. In rejecting that contention, the Court observed (342 U.S. at 52): "The search and seizure are * * * incapable of being untied." It then stated (342 U.S. at 53-54):

> We are of the opinion that Congress in abrogating property rights in such goods, merely intended to aid in their forfeiture and thereby prevent the spread of the traffic in drugs rather than to abolish the exclusionary rule formulated by

> the courts in furtherance of the high purposes of the Fourth Amendment. * * *
>
> Since the evidence illegally seized was contraband the [defendant] was not entitled to have it returned to him. It being his property, for purposes of the exclusionary rule, he was entitled on motion to have it suppressed as evidence on his trial.

Such reasoning is, we think, questionable in light of the subsequent determination in *Jones*, *supra*, that a person who is "wrongfully" occupying or possessing real property "cannot invoke the privacy of the premises searched" (362 U.S. at 267). As noted earlier (*supra* pp. 25-26), this principle should have equal application to personal property; one whose possession of stolen goods or contraband is "wrongful" should similarly not be permitted to invoke a privacy in the personalty seized. He can reasonably expect that efforts will be made by the authorities to apprehend such goods to return them to their rightful possessor. Hence, so long as there is no intrusion on some legitimate expectation of privacy (*i.e.*, privacy of person, home or office) while property of this nature is recovered, no "standing" should attach by virtue of the fact of wrongful possession alone.[21]

To the extent that *Jeffers* suggests otherwise, we submit that its rationale should be abandoned. It is not supported by traditional notions of property law; and, more importantly, it is not supported by considerations of privacy stressed in the Court's more

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[21] But see n. 17, *supra*.

recent opinions. Indeed, this Court seemed to intimate such a conclusion in the margin of the plurality opinion in *Alderman* v. *United States*, *supra*, wherein rules were fashioned as to "standing" for Fourth Amendment purposes of persons overheard by electronic surveillance. There, the Court held, *inter alia*, that a homeowner had standing to suppress evidence of illegally overheard conversations occurring on his premises, even if he was not present and did not participate in the conversations. Responding to Mr. Justice Harlan and Mr. Justice Stewart, who were in partial dissent on this phase of the opinion, the plurality stated (394 U.S. at 177) that the homeowner could properly object to the use of such conversations against him, "not because he had any interest in the seized items as 'effects' protected by the Fourth Amendment, but because they were the fruits of an unauthorized search of his house, which is itself expressly protected by the Fourth Amendment." The seizure of narcotics in the home was noted as an appropriate analog (394 U.S. at 177 n. 10):

> If the police enter a house pursuant to a valid warrant authorizing the seizure of specified gambling paraphernalia but discover illegal narcotics in the process of the search, the narcotics may be seized and introduced in evidence in the prosecution of the homeowner, whether the narcotics belong to him or to a third party. * * * But if the officers have neither a warrant nor the consent of the householder, it is elementary Fourth Amendment law that the narcotics are suppressible on his motion. * * * *The reason that*

> *the narcotics may be seized and introduced in evidence in the first case * * * but not in the second case where there was no warrant is not the simple reason suggested by Mr. Justice Harlan that the householder has a property interest in the narcotics and therefore has "standing" to object.* Rather, it is because in the first case there was no illegal invasion of the premises, while in the second the officer's entry and search violated the Fourth Amendment, the narcotics being the fruit of that illegality. (Emphasis added.)

It is this focus on the interest in privacy, rather than on the mere fact of possession, that we believe is the proper approach to the question of standing under the Fourth Amendment, notwithstanding certain language to the contrary in *Jeffers*.

b. Apparently, what worried the Court in *Jeffers* was the prospect of a substantial diminution in the deterrent impact of the exclusionary rule upon law enforcement officers if it did not recognize an interest in the seized contraband sufficient in itself to confer standing. We doubt that such an effect would have occurred; nor do we think that it will occur if the position we urge here is adopted. See Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970); *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, *supra*, 403 U.S. at 415-418 (Burger, C.J., dissenting). The fact that stolen goods, if in the hands of a "wrongful" possessor, are themselves entitled to no special protection under the Fourth Amendment does not encourage law

enforcement officers to be any less circumspect in their intrusions on a person's legitimate expectation of privacy in order to recover such property. And, if the circumstances surrounding a search are such that the defendant's right to privacy was not infringed—as is our submission in the present case—there is no more reason to accord standing simply to augment the impact of the exclusionary rule than in circumstances where other evidence is seized from third parties that, under present law, clearly can be introduced against persons whose privacy has not been invaded. See *Alderman* v. *United States*, *supra*, 394 U.S. at 171-172, 175.[22] See also *Parman* v. *United States*, 399 F.2d 559, 564-565 (C.A.D.C.), certiorari denied, 393 U.S. 858; *Feguer* v. *United States*, 302 F.2d 214, 248-250 (C.A. 8), certiorari denied, 371 U.S. 872;[23] cf. *Klingler* v. *United States*, 409 F.

[22] In *Alderman*, the Court rejected an argument by the defendant that the rules of standing should be liberalized as a means of increasing the deterrent function of the exclusionary rule on the conduct of law enforcement officers (see, *e.g.*, *Elkins* v. *United States*, 364 U.S. 206; *Linkletter* v. *Walker*, 381 U.S. 618, 636-637), indicating that it was "not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth" (*Alderman*, *supra*, 394 U.S. at 174-175). See also *Lego* v. *Twomey*, No. 70-5037, this Term, decided January 12, 1972, slip op., pp. 10-12.

[23] These cases rejected an argument that, in order to effectuate the deterrent function of the exclusionary rule, evidence seized by law enforcement authorities from abandoned premises should be suppressed where the agents did not know,

2d 299, 304-305 (C.A. 8), certiorari denied, 396 U.S. 859.

4. *The dual rationale of Jones.* There still remains the question whether the possessory charge in this case is alone reason to confer standing automatically so as (a) to avoid placing petitioner in a *Jones* "dilemma," and (b) to prevent the prosecution from benefitting from "inconsistent * * * positions." We think not. If our above analysis with respect to Fourth Amendment considerations is correct, neither rationale sustaining the automatic standing rule of *Jones* is relevant in the present situation, where possession relates only to stolen goods. Accordingly, to establish "standing," petitioner should be required to show that the seizure here took place under circumstances that amounted to an invasion of a legitimate expectation of privacy.

a. The "dilemma" that concerned the Court in *Jones*, should a defendant be required to establish standing, rests essentially on the argument, as indicated earlier (*supra*, pp. 12-13), that to vindicate his Fourth Amendment rights on a motion to suppress, the defendant might have virtually to admit his guilt of the offense charged. That "special problem". (362

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at the time of their search and seizure, that an abandonment had occurred, and the search would have been illegal but for that fact. Since the defendant's privacy had not been invaded, the courts found no occasion to exclude the evidence merely to attempt to deter a repetition of the same type of conduct by the agent. See also *Massachusetts* v. *Painten*, 389 U.S. 560, 564-565 (White, J., joined by Stewart and Harlan, J. J., dissenting from the dismissal of certiorari as improvidently granted).

U.S. at 261) was partially answered in *Jones* by relaxing the conventional standing requirements for possessory offenses.

Several years after *Jones*, however, this Court, in *Simmons* v. *United States*, 390 U.S. 377, provided a more complete response to the "dilemma" confronting defendants with Fourth Amendment claims. As observed earlier, the *Simmons* case involved the question of the use against a defendant at trial of testimony offered to establish his standing on a suppression motion. If the earlier testimony were available to the prosecution for later use, the Court noted, this might well deter some defendants "from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim" (390 U.S. at 392-393). And, as recently explained in *McGautha* v. *California*, 402 U.S. 183, 211-213, wherein the rationale of *Simmons* was reexamined, such a prospect of self-imposed restraint in this area could thus have the effect of "weakening the efficacy of the exclusionary rule as a sanction for unlawful police behavior." "This," the Court has since recognized (*McGautha* v. *California*, 402 U.S. at 211), "was surely an analytically sufficient basis" for the use-restriction rule that emerged in *Simmons*.[24]

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[24] The *Simmons* Court also sought to sustain its holding on the ground that a use-restriction rule was necessary to avoid the "intolerable" situation of a defendant being forced to choose between giving up "what he believed * * * to be a valid Fourth Amendment claim, or, in legal effect, to waive his Fifth Amendment privilege against self incrimination" at trial (390 U.S. at 394). But, in *McGautha* (402 U.S. at

While *Simmons* arose in the context of a prosecution for a non-possessory offense, the principle enunciated therein, that evidence given by a defendant in a suppression hearing may no longer be used against him at trial, has equal application here where the indictment charges a crime of possession.[25] Consequently, the *Jones* "dilemma" has essentially been removed by the subsequent use-restriction rule of *Simmons*.[26] Cf. *United States* v. *Price*, *supra*, 447 F. 2d at 29; *United States* v. *Cobb*, *supra*, 432 F.2d at 721-722. If, then, there is any vitality left to the

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212), this Court stated that the validity of such reasoning, "based on a 'tension' between constitutional rights and the policies behind them * * * must now be regarded as open to question." It did not, however, question the soundness of the result in *Simmons* (402 U.S. at 212).

[25] Of course, an abandonment of the automatic standing rule of *Jones* in favor of an extension of the *Simmons* use-restriction principle to persons charged with possessory offenses would not allow an affirmance of the decision below as to lack of standing in this case. Petitioner cannot be taxed with having had to anticipate such a modification of *Jones*, and so penalized for his failure to testify in support of his "standing" on the motion to suppress. Compare *Williams* v. *United States*, 401 U.S. 646. See pp. 40-41, *infra*.

[26] It is unclear whether the rule in *Simmons* is limited to the *direct* use at trial of the defendant's earlier testimony, or also bars the introduction of prior contradictory statements for purposes of impeachment. In *Harris* v. *New York*, 401 U.S. 222, this Court, in a different context, held that the use-restriction rule for in-custody statements under *Miranda* v. *Arizona*, 384 U.S. 436, did not preclude the prosecution from using such statements to impeach (401 U.S. 226). *Harris* was concerned with a use-restriction rule grounded on the policy of deterring unlawful police behavior during custodial inter-

dual rationale of the possessory aspect of *Jones*, it must be found in the alternative basis advanced for the automatic standing rule (362 U.S. at 263): *i.e.*, "to hold to the contrary, that is, to hold that [the

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rogation; and it was there determined (401 U.S. at 225) that "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *Simmons*, on the other hand, established a use-restriction rule, as we have pointed out, grounded on a different consideration, *i.e.*, so that defendants will not "be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim" (390 U.S. at 392-393). In this context, the question whether such deterrence is reduced enough by assuring a defendant that his prior testimony cannot be used against him at trial *directly* so that its use *indirectly* by the government for impeachment purposes can be permitted, is a difficult one that may not be settled by *Harris*. But it is not presented in this case.

We point out, however, that if the *Harris* holding can appropriately be extended to the use-restriction rule of *Simmons*, such a result would not, in our view, resurrect for the defendant the type of "dilemma" that concerned the Court in *Jones*. The prospect that earlier testimony might be used at trial solely for impeachment purposes is legitimate cause for concern only if the defendant intends to "use perjury by way of a defense" (*Harris* v. *New York*, *supra*, 401 U.S. at 226). His "dilemma," then, does not rest on the fact that, if he tells the truth at the suppression hearing, he virtually confesses his guilt of the possessory offense, which is what bothered the Court in *Jones*. It is, rather, that if he speaks truthfully on one occasion, he cannot make contradictory statements on the other. But, any time a person testifies under oath he is "under an obligation to speak truthfully and accurately" (*Harris* v. *New York*, *supra*, 401 U.S. 225). Accordingly, it would seem particularly inappropriate to relax the requirements for standing to suppress simply to "free [the defendant] from the risk of confrontation with prior inconsistent utterances" (*id.* at 226). But see n. 28, *infra*.

defendant's] failure to acknowledge interest in the [property] or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction."

b. But, as we understand the fundamental inquiry for purposes of establishing standing to suppress under the Fourth Amendment, this reasoning must also fail. For it does not follow that the government, in a prosecution involving a charge of possession of stolen property, would under our position have the benefit of "contradictory assertions of power" as noted in *Jones* (362 U.S. at 264).

Petitioner's conviction most certainly flows from proof of his knowing possession of the stolen whiskey before and at the time of the search. Yet, the admissibility into evidence of the fruits of that search, on the ground that petitioner lacked standing, is perfectly consistent, in our view, with the theory that the petitioner had constructive possession at all relevant times. In the absence of any intrusion upon the privacy of petitioner's own person, papers or effects, or upon private premises in which he has a sufficient Fourth Amendment interest, the evidence is admissible. And, if we are correct in our position that no such claim of privacy can be sustained on the basis of mere possession alone when that possession is knowingly wrongful, the possessory interest that is an essential element of proof for conviction is, for the government, irrelevant to the standing question on the

motion to suppress.[27] See *United States* v. *Lopez*, *supra*, 420 F.2d at 317. There is thus no inconsistency in the government's asserting before the jury on the issue of guilt that the defendant had possession of the seized property, while requiring the defendant, on a motion to suppress, to demonstrate that some legitimate expectation of privacy on his part was invaded by the search and seizure.[28]

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[27] Indeed, the only situation in which the possessory interest in stolen property might conceivably have any relevancy on a motion to suppress would be where, unlike the present case, the accused claimed that he was in possession but that his possession was innocent, in that he had no knowledge that the property was stolen. Assuming *arguendo* that such a claim, if satisfactorily demonstrated, would be sufficient to establish standing under the Fourth Amendment—which is by no means clear (see n. 17, *supra*)—it might then be necessary for the government to refute the claim of innocent possession before the evidence can be admitted. But, in so doing, the government would not be asserting a position inconsistent with, or contradictory to, its position at trial. Nor would the accused need to be concerned that in attempting to vindicate his Fourth Amendment rights on the basis of such a claim, he would have to admit to possession of the stolen property; that "dilemma" is resolved by the use-restriction rule of *Simmons*.

[28] However, if the *Harris* holding, permitting use at trial of a defendant's prior statements for purposes of impeachment, were recognized as an appropriate modification of the *Simmons* rule, we would not think that the defendant should be put to the task of establishing standing under the Fourth Amendment in circumstances where the theory of the government's case under the possessory charge acknowledges a clear invasion of privacy—*i.e.*, where the stolen goods have been seized on the person of the accused or were taken from his own premises. We say this because, if, as a practical matter, the defendant chooses not to vindicate his Fourth Amendment

In taking such a stand, the prosecution does not, as *Jones* suggested (362 U.S. at 263), subject petitioner "to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation." The "remedies" under the exclusionary rule depend upon some transgression of the constitutional right to individual privacy. They should not be afforded automatically to one charged with "lawless possession" when the sole basis for his claim is the seizure of stolen property in which he has no legitimate proprietary interest and with respect to which he can have no reasonable expectation of privacy under the Fourth Amendment. See *Alderman* v. *United States*, *supra*, 394 U.S. at 179 n. 11.

III. If the Court Agrees With Our Position on the Standing Issue, This Case Should Be Remanded For a Hearing

In the present case, there has been no testimony on the issue of standing before the district court, because the district judge ruled on the merits that the affidavit for the search warrant pursuant to which the stolen whiskey was seized was valid. In view of the government's concession to the contrary (both in the court below and here), it seems appropriate that the in-

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claim due to the risk of possible *limited* use at trial of his earlier testimony, the government would then have the benefit of inconsistent positions. That, of course, would not be so in the present case, however. Since here the government's theory under the possessory charge does not depend on any acknowledgement of an invasion of privacy, but is, indeed, consistent with the argument that no privacy rights of this petitioner were violated, petitioner should be required to establish "standing" under the Fourth Amendment.

stant case be remanded to the district court for a determination of the question whether petitioner was a victim of an invasion of privacy with respect to the seizure of the stolen whiskey.

Petitioner was admittedly not present at the time of the seizure in the shed on his father's farm. Resolution of the issue will therefore depend on whether, when the search occurred, petitioner had sufficient permission to be on the property so as to have a "possessory interest" therein (see *Mancusi* v. *DeForte, supra*, 392 U.S. at 367) (see p. 29, *supra*). Cf. *United States* v. *Jeffers*, 342 U.S. 48. Although certain testimony at the trial before the jury has a bearing on this question, the fact-finder has not yet had an opportunity to resolve the issue in terms of the principles relating to "standing" which we believe should govern this case.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed and the case remanded with directions to send it back to the district court for a hearing on the question of petitioner's "standing" in accordance with the principles previously enunciated.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

No. 71–517

Elisha Combs, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 26, 1972]

PER CURIAM.

We granted certiorari on claims that evidence introduced against petitioner was obtained through an unlawful search that petitioner has standing to challenge. The Government now suggests that the warrant authorizing the search was invalid, but that further factual determinations are required to resolve the question of petitioner's standing to challenge the admission in evidence of the alleged stolen goods seized by government agents.

Petitioner and his father were convicted after a joint trial[1] under an indictment charging them with having violated 18 U. S. C. § 659[2] by receiving, possessing, and

[1] Both men were convicted, but petitioner's father did not appeal; another codefendant at the trial was petitioner's brother, who was acquitted on a related charge.

[2] Section 659 provides as follows:

"Whoever . . . unlawfully takes, carries away, or conceals or by fraud or deception obtains from any . . . railroad car . . . or other vehicle, or from any . . . station house, platform or depot . . . with intent to convert to his own use any goods or chattels moving as or which are a part of . . . an interstate or foreign shipment . . . ; or

"Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; . . .

"Shall . . . be fined not more than $5,000 or imprisoned not more than ten years, or both . . . ."

concealing 26 cases of tax-paid whiskey known by them to have been stolen from an interstate shipment. The Government's evidence at trial tended to show that petitioner delivered 40 cases of whiskey to the Newport, Kentucky, home of a Mrs. Ballard, who had previously expressed her willingness to buy it. The day after the delivery, Mrs. Ballard, having sold some of the whiskey but having thereafter heard that it was stolen property, telephoned petitioner and told him to remove the remainder of the whiskey from her home. Petitioner and one Martin then moved the whiskey to the home of petitioner's estranged wife; a few days later, however, petitioner telephoned Martin and told him that "the heat was on" and the whiskey would have to be moved once again. The two men then transported the whiskey to Hazard, Kentucky, where they stored it in a shed on a farm owned by petitioner's father.

Sometime later, Martin told an FBI agent of the stolen whiskey; when the agent in turn passed the information on to the Kentucky state police, the latter obtained a warrant authorizing a search for, and seizure of the whiskey at the property of petitioner's father. The warrant was supported by an affidavit which the Government now suggests was insufficient under the holding of *Aguilar* v. *Texas*, 378 U. S. 108 (1964). Armed with that warrant, the state police went to the farm owned by petitioner's father and conducted a search that led to the discovery and seizure of 26 cases of whiskey identified as having been stolen from a railroad shipment intended for delivery to the Michigan Liquor Control Board. Petitioner was not living on his father's property, nor was he present there, when the search and seizure took place.

Prior to trial, the defendants jointly moved the District Court to suppress the whiskey from evidence on the ground that there was no showing of probable cause

o support the issuance of the warrant. The District Court, following an evidentiary hearing,[3] denied the motion on the merits, and the evidence was subsequently introduced at trial. Following the conviction of petitioner and his father, only the petitioner appealed, raising the single issue of the validity of the warrant; the Court of Appeals did not reach the merits of his claim respecting the warrant, however, holding only that he lacked standing to challenge the legality of the search and seizure. 446 F. 2d 515.

In concluding that petitioner lacked such standing, the Court of Appeals noted, *inter alia*, that he had "asserted no possessory or proprietary claim to the searched premises" during the course of the trial. 446 F. 2d, at 516. Clearly, however, petitioner's failure to make any such assertion, either at the trial or at the pretrial suppression hearing, may well be explained by the related failure of the Government to make any challenge in the District Court to petitioner's standing to raise his Fourth Amendment claim. In any event, the record now before us is virtually barren of the facts necessary to determine whether petitioner had an interest in connection with the searched premises that gave rise to "a reasonable expectation [on his part] of freedom from governmental intrusion" upon those premises. *Mancusi* v. *DeForte*, 392 U. S. 364, 368 (1968).[4] If petitioner can establish

[3] No evidence relating to petitioner's standing was introduced at the hearing.

[4] The Court in *Mancusi* relied upon *Jones* v. *United States*, 362 U. S. 257 (1960), as having done away with "the requirement that to establish standing one must show legal possession or ownership of the searched premises." 392 U. S., at 369. In *Jones*, the Court held that the petitioner then before it had standing and enunciated two rules as alternative grounds for its decision. First, the *Jones* Court ruled that the "possession on the basis of which [an accused] is to be . . . convicted suffices to give him standing under any fair

facts showing such an interest, he will have demonstrated a basis for standing to attack the search; re-examination of the validity of the warrant in light of the Government's present position on that issue would then be appropriate to resolve the question whether evidence of the seized whiskey was properly introduced at petitioner's trial.

Since there has not yet been any factual determination of whether petitioner had an interest in the searched premises that was protectible under the doctrine of *Mancusi* v. *DeForte*, we vacate the judgment of the Court of Appeals and remand with directions that the case be sent back to the District Court for further proceedings consistent with this opinion.

Vacated and remanded.

MR. JUSTICE DOUGLAS concurs in the result.

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and rational conception of the requirements of Rule 41 (e)," Fed. Rule Crim. Proc.; second, the Court ruled that "anyone legitimately on premises where a search occurs" has standing to challenge the legality of that search. 362 U. S., at 264, 267. The Government has urged that we take the opportunity, said to be presented by the instant case, to re-examine the first alternative holding of *Jones*. Even assuming we were disposed to do so, the Court of Appeals did not, in the opinion it filed in this case, deal with the question whether the nature of the charge against petitioner brought his case within the coverage of the first aspect of the *Jones* holding, and we decline to reach or consider issues not yet passed on by that court.